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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~503~~. 190

THE SANFORD FORK AND TOOL COMPANY ET AL., APPELLANTS,

vs.

HOWE, BROWN & COMPANY, LIMITED; CORTLAND TOP AND RAIL COMPANY, LIMITED, AND THEODORE STEVENSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JUNE 3, 1891.

(14,670.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1893.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in May, in the year of our Lord one thousand eight hundred and ninety-one, before Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

HOWE, BROWN & COMPANY, LIMITED; Cortland Top & Rail Company, Limited, and Theodore Stevenson *vs.* SANFORD FORK & TOOL COMPANY, BUENA V. Marshall, Trustee; William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver of the Sanford Fork & Tool Company.	No. 8612. Chancery.

Be it remembered that heretofore, to wit, at the May term of said court, on the 17th day of July, 1890, before Honorable William A. Woods, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by McNutt & McNutt, their solicitors, and file their bill of complaint herein in the words following, to wit:

To the honorable judges of the United States circuit court for the district of Indiana:

The plaintiffs, who bring this their creditors' bill in behalf of themselves and all other creditors who may come in and pay their share of the costs and expenses, complaining of the defendants, respectfully show to the court and charge that the said plaintiff, Howe, Brown & Co., is a corporation duly organized under the laws of the State of Pennsylvania and is a resident and citizen of the city of Pittsburgh, in said State of Pennsylvania; that the said plaintiff, The Cortland Top & Rail Co., Limited, is a corporation duly organized under the laws of the State of New York and is a resident of said State of New — and of the city of Cortland therein
2 and carrying on their business in said State; that the said Theodore Stevenson, a natural person, is a resident and citizen of the State of New York and of the city of Cortland therein; that the said defendants, the said Sanford Fork & Tool Co., is a corporation duly organized under the laws of the State of Indiana, is a citizen and resident therein and at the city of Terre Haute therein, and that the said other defendants are each and all citizens and residents of the said State of Indiana and of the said city of Terre Haute therein.

And your orators further show that the said defendant, the said Sanford Fork & Tool Co., was carrying on business in said city of

Terre Haute at the dates and times hereinafter set out up to the 13th day of May, 1890; that the business of the said corporation was the manufacturing of forks, shovels, tools, and other implements.

And your said orators the said Howe, Brown & Co., Limited, allege and aver that on the 11th day of January, 1890, it sold and delivered to the said defendant, The Sanford Fork & Tool Co., merchandise, for which the said Sanford Fork & Tool Co. executed to it its promis-ory note of that date, payable four months from date, for the sum of one thousand dollars ($1,000), without any relief from valuation or appraisement laws, with 8% interest after maturity and attorney's fees; that on the 18th day of January, 1890, the said Howe, Brown & Co. sold to the said Sanford Fork & Tool Co. goods and merchandise to the value of one thousand and nineteen dollars and twenty-five cents ($1,019.25), for which the said Sanford Fork & Tool Co. executed to it its promis-ory note of that date for the sum of one thousand and nineteen dollars and twenty-five — ($1,019.25), payable four months after date, with 8%
3 interest after maturity and attorney's fees; that on the 25th day of April, 1890, the said defendant, Sanford Fork & Tool Co., purchased of the said Howe, Brown & Co. goods and merchandise of the value of one thousand and twenty-five dollars and twenty-five cents ($1,025.25), for which it executed to the said Howe, Brown & Co. its promis-ory note of said date for said sum of one thousand twenty-five dollars and twenty-five cents ($1,025.25), payable — months after date, with 8% interest after maturity and attorney's fees; that on the same day the said Sanford Fork & Tool Co. purchased of the said Howe, Brown & Co. goods and merchandise to the value of -ine hundred and eighteen dollars and seventy-six cents ($918.76), for which it executed its note of said date, payable three months after date, with 7% interest after maturity and attorney's fees; that on the 7th day of April, 1890, the said Howe, Brown & Co. sold to the said Sanford Fork & Tool Co. goods and merchandise to the value of six hundred and five dollars and sixty-five cents ($605.65), for which the said defendant, Sanford Fork & Tool Co., executed to the said Howe, Brown & Co. its promis-ory note of that date, payable four months after date, with 8% interest after maturity and attorney's fees; that on the 10th day of April, 1890, the said Howe, Brown & Co. sold to the said Sanford Fork & Tool Co. merchandise to the value of one thousand and sixteen dollars and forty-two cents ($1,016.42), for which the said Sanford Fork & Tool Co. on said date executed its promis-ory note to the said Howe, Brown & Co., payable four months after date, with interest at 8% after maturity and attorney's fees.

And the said Cortland Top & Rail Co., plaintiffs, would respectfully show to the court and charge that on December 30th,
4 1889, the said plaintiff sold to the said Sanford Fork & Tool Company merchandise to the value of five hundred and ninety-five dollars and twenty-five cents ($595.25), for which the said Sanford Fork & Tool Co. executed on said day its promis-ory note, payable May 12th thereafter; that afterwards, on February 4th, 1890, the said plaintiff sold to the said Sanford Fork & Tool Co.

merchandise to the value of six hundred and forty-two dollars and fifty cents ($642.50), for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable May 25th, 1890; that on said 4th day of February, 1890, the said plaintiff sold to the said Sanford Fork & Tool Co. merchandise of the value of six hundred dollars ($600), for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable on the 31st day of May thereafter; that on the said 4th day of February, 1890, the said plaintiff sold to the said Sanford Fork & Tool Co. merchandise of the value of six hundred and fifty dollars ($650), for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable four months after date; that on the 30th day of December, 1889, the said plaintiff sold to the said Sanford Fork & Tool Co. goods and merchandise of the value of six hundred and forty-eight dollars and fifty cents ($648.50), for which the said Sanford Fork & Tool Co. executed its note, payable May 20th, 1890; that on the 30th day of December, 1889, the said plaintiff sold to the said Sanford Fork & Tool Co. goods and merchandise to the value of six hundred and thirteen dollars and fifty cents, for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable on the 28th day of May, 1890; that on the same day the said Sanford Fork & Tool Co. purchased of said plaintiff, Cortland Top & Rail Co., goods and
5 merchandise to the value of six hundred and forty-two dollars ($642), for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable May the 5th, 1890; that on the 4th day of February, 1890, the said plaintiff sold to the said Sanford Fork & Tool Co. goods and merchandise to the value of six hundred and seven dollars and fifty cents ($607.50), for which the said Sanford Fork & Tool Co. executed its promis-ory note, payable June 5th, 1890; that all of said promis-ory notes so executed by the said Sanford Fork & Tool Co. to the said plaintiff, The Cortland Top & Rail Co., Limited, are payable without relief from valuation or appraisement laws, with interest after maturity and attorney's fees.

And the said plaintiff, the said Theodore Stevenson, would respectfully show to the court and aver that on the 15th day of February, 1890, the said defendant, Sanford Fork & Tool Co., executed to the said Stevenson its promis-ory note for the sum of two hundred and three dollars ($203), payable four months after date at the National State bank at Terre Haute, Indiana, and payable without relief from valuation or appraisement laws, with 8% interest from date until paid and attorney's fees; that afterwards, on the 16th day of June, 1890, the said defendant, Sanford Fork & Tool Co., executed to the said plaintiff, Stevenson, its promis-ory note for two hundred and eight dollars and ninety-eight cents ($208.98), payable four months after date, without relief from valuation or appraisement laws, with 8% interest from maturity and attorney's fees; that on February 12th, 1890, the said defendant, Sanford Fork & Tool Co., executed to the said plaintiff, Stevenson, its promis-ory note for the sum of one hundred and fifty-nine dollars ($159), payable at
6 the National State bank, Terre Haute, Indiana, without any relief from valuation or appraisement laws, with 8% interest

from maturity and attorney's fees; that on January 15th, 1890, the said defendant, Sanford Fork & Tool Co., executed to the said plaintiff, Stevenson, its promis-ory note for two hundred and ninety-seven and thirteen-hundredths dollars ($297.13), payable at the Vigo County National Bank of Terre Haute, Indiana, without relief from valuation or appraisement laws, with 8% interest from maturity until paid and attorney's fees; that on February 5th, 1890, the said defendant, Sanford Fork & Tool Co., executed to the said plaintiff, Stevenson, its promis-ory note for one hundred and ninety-nine dollars ($199), payable at the National State bank, Terre Haute, Indiana, with 8% interest from maturity and attorney's fees; that on the 8th day of February, 1890, the said defendant executed to plaintiff Stevenson a like note for two hundred and twenty-three dollars ($223).

And your orators, the plaintiffs, further show to the court that on the 17th day of March and long prior thereto the said defendant-, William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, and Willard Kidder, were and each of them was a stock and share holder in the said defendants' corporation, the Sanford Fork & Tool Co.; that all of said defendants except the said Anton Mayer were on the 17th day of March, 1890, and long prior thereto had been the directors of the said corporation, duly elected and acting as such; that prior to the said 17th day of March, 1890, the said defendants, McKeen, Hulman, Nixon, Minshall, Mayer, and Kidder, had become and were accommodation endorsers of the paper, notes,
7 and bills of the said corporation, the said Sanford Fork and Tool Co.; that on the 17th day of March, 1890, the said corporation, the said Sanford Fork & Tool Co., being in failing circumstances and insolvent and unable to pay all its debts, the said defendants, the said McKeen, Hulman, Nixon, Minshall, Mayer, and Kidder, procured a meeting of the stockholders of said corporation to be had and held and procured the stockholders, they themselves each and severally being large shareholders in said corporation, to pass an order and corporate act authorizing the directors to make and execute a mortgage to secure and indemnify the said McKeen, Hulman, Nixon, Minshall, Mayer, and Kidder against any and all loss as such endorsers of the paper, notes, and bills of said corporation; that thereafter, on the 17th day of March, 1890, the said directors, McKeen, Hulman, Nixon, Minshall, and Kidder, being the sole directors of said corporation, directed the officers of said board of directors to make and execute to the defendant Buena V. Marshall, as trustee for themselves and the said Mayer, a mortgage on the said Sanford Fork & Tool Co.'s buildings, machinery, and plant generally in the sum of seventy-five thousand dollars ($75,000) to indemnify themselves and the said Anton Mayer against any loss by reason of their endorsement theretofore of the notes and bills of the said corporation and against any loss by reason of any future renewals of the said notes and bills so as aforesaid endorsed by them; that thereupon and in pursuance of said direction of said board of directors the officers thereof, to wit, the said Kidder, as president,

and the said Nixon, as secretary, did on the 17th day of March, 1890, execute to the said Buena V. Marshall such mortgage (a
8 copy of which is exhibited herewith, attached hereto, and made part hereof), and which said mortgage stipulates to indemnify the said mortgagees therein mentioned against any loss which they may sustain as sureties of the said tool company in the manner aforesaid.

And your orators further show that on the 7th day of May, 1890, a suit was instituted in the Vigo circuit court of Vigo county, Indiana, wherein The National State Bank of Terre Haute, Indiana, was plaintiff and the said Sanford Fork & Tool Co. *et al.* were defendants, said suit being founded upon certain promis-ory notes, bills of exchange, and other indebtedness due from the said Sanford Fork & Tool Co. to the said plaintiff, and also seeking and praying for the appointment of a receiver by the said court to take charge of the assets of the said corporation the said Sanford Fork & Tool Co.; that afterwards, on the 13th day of May, 1890, the court by an interlocutory order did upon hearing appoint one John W. Davis, Esq., a receiver, in accordance with the prayer of the complaint in said action, to take charge of all the assets of the said corporation. The said appointee duly accepted the said trust and filed the necessary bond and took charge of the said assets and still continues in charge thereof and in his said office as receiver of the said corporation, appointed by the said Vigo circuit court.

Your orators further show that at the time when the said mortgage was executed in the manner aforesaid to the said defendant, Buena V. Marshall, the said defendant, The Sanford Fork & Tool Co., was largely indebted, to wit, in the sum of two hundred and seventy-five thousand dollars ($275,000); that the act of the
9 stockholders in the authorizing of the execution of said mortgage and the act of the directors and officers in executing the same in the manner aforesaid were kept secret from the other creditors and persons who were dealing with said corporation and from these plaintiffs, who had been and still were furnishing material, merchandise, &c., to the said corporation and who continued in ignorance of the existence of said mortgage and of the action of said stockholders and the said board of directors both of the financial condition of the said corporation and of the fact that the said mortgage had been executed; that the said mortgagee, the said Buena V. Marshall, and the said beneficiaries thereof withheld the said mortgage from registration until the time within which the same could be lawfully put of record had elapsed save one day; that the said mortgagee and the said beneficiaries therein, although they knew that the plaintiff the said Howe, Brown & Co. and the said Cortland Top & Rail Co. had been giving credit to the said defendant corporation and were still selling and liable to sell other merchandise to said defendant corporation, withheld all notice from them of the execution of said mortgage, as did also the said defendant, the said Sanford Fork & Tool Co.

And your orators show that by reason of the foregoing facts the said mortgage to the said defendant, Marshall, as trustee, and as to

the said beneficiaries therein is void so far as the same seeks or is calculated to effect the rights and interests of these plaintiffs, creditors as aforesaid of said corporation.

10 And your orators further show that after the appointment by the said Vigo circuit court of the said John W. Davis, Esq., as receiver of said defendant corporation, to wit, on the — day of July, 1890, the judge of said court entered of record in said cause and proceeding an order directing and prescribing that the said receiver should prepare a registry of claims, and that all creditors of said corporation should file the said claims with the said receiver, who should, if satisfied of the correctness thereof, make the proper entry in the said registry allowing the same, which allowance should operate as an adjudication of said claims; that in pursuance of said order the said receiver did make and prepare such registry, and these plaintiffs, each and severally, filed with the said receiver, copies of their several notes and asked an allowance in their behalf thereon; that thereupon and on inspection — the said claims the said receiver did, in due form of law and according to the manner prescribed by the said Vigo circuit court, allow their several claims:

To the said Howe, Brown & Co. the sum of.....	$5,592 88
To the said Cortland Top & Rail Co. the sum of.....	5,059 36
To the said Stevenson the sum of.....	1,381 15
Which sums together aggregate the sum of.....	$12,033 39

no part of which has been paid and all of which is due.

And your orators further show that the said defendant, Buena V. Marshall, trustee as aforesaid, and the said beneficiaries of the said mortgage executed to the said Marshall are and each of them is threatening to enforce and assert as a prior and exclusive

11 lien the said mortgage as against the other creditors and particularly as against these plaintiffs.

And your orators show that if the said mortgagees are allowed and permitted to enforce the said mortgage that the same will exhaust, or nearly so, the assets of said concern, and the other creditors, particularly these plaintiffs, will be defeated of their just rights as such creditors.

In consideration of which premises your orators, jointly and severally, respectfully insist that the said mortgage executed by the said Sanford Fork & Tool Co. in the manner aforesaid to the said defendant, Buena V. Marshall, as trustee, for the use and behoof of the said McKeen, Hulman, Minshall, Kidder, Nixon, and Mayer, was and is fraudulent as to your orators and other creditors, both constructively, as being against public policy, and actually, as being against good conscience and sound morality, and therefore said mortgage ought to be set aside and held for naught, and that said beneficiaries thereof should, as to any claim or claims which they or any of them may have now or hereafter by reason of any payment or payments by them or any of them of any of said liabilities of said Sanford Fork & Tool Co. on which they or any of them are

endorsers or security, be adjudged to stand in respect to the fund in said receiver's hands as other general and unsecured creditors.

Wherefore your orator- humbly pray that the said defendants, the said Marshall, as trustee, and the said McKeen, Hulman, Minshall, Nixon, Mayer, and Kidder, as beneficiaries and equitable
12 mortgagees, be, all and every of them, forever enjoined from instituting any proceedings upon or asserting any claim under or by virtue of said mortgage.

And your orators further pray that said mortgage be adjudged and decreed null and of no effect, and that it be set aside, and that your orators may have such orders, process, and other relief in the premises as may seem meet unto this honorable court.

And may it please your honors to grant unto your orators writs of subpœna, to be directed to the Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Robert Nixon, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork & Tool Company, thereby commanding them, at a certain day and under certain penalties therein expressed, personally to appear before this honorable court, and then and there full, true, direct, and perfect answers make to all and singular the premises, and further to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable court shall seem meet.

HOWE, BROWN & COMPANY,
CORTLAND TOP & RAIL COMPANY,
THEODORE STEVENSON,
By McNUTT & McNUTT,
Their Attorneys and Solicitors.

13 This indenture made & executed *into* this 17th day of March A. D. eighteen hundred & ninety, by and between the Sanford Fork & Tool Co. a corporation of the State of Indiana & Buena V. Marshall of Vigo county in the State of Indiana, as trustee,

Witnesseth—Whereas the said company is indebted in a large amount to sundry persons & a portion of such indebtedness is evidenced by certain promis-ory notes indorsed by sundry persons as sureties for said company, which notes are described as follows: to wit:

One note to the Terre Haute savings bank for five thousand ($5,000) dollars, dated September 18th, 1890, due in five months from date endorsed by R. Nixon, Wm. R. McKeen, H. Hulman & Willard Kidder—

One note to the Terre Haute savings bank dated September 18th 1890, due in six months from date for five thousand dollars & endorsed by the parties last above named—

One note to R. Nixon, dated December 14th, 1889, due on or before March 15th 1890, for fifteen thousand (15,000) dollars, endorsed by R. Nixon, H. Hulman, & Willard Kidder & held by the Vigo County National bank.—

One note to R. Nixon, dated Jan'y 21st 1890, due sixty days after

date for five thousand (5,000) dollars indorsed by R. Nixon, William R. McKeen, H. Hulman, & Willard Kidder and held by the Terre Haute savings bank.—

One note to D. W. Minshall, dated Jan'y 21st 1890, due thirty days after date for four thousand dollars (4,000) endorsed by D. W. Minshall, H. Hulman, Willard Kidder & William R. McKeen, and held by the 1st National Bank of Brazil—

14 One note dated Jan'y 30th, 1890, to R. Nixon, due in ninety days after date, for fifteen thousand dollars (15,000) endorsed by R. Nixon, Willard Kidder, William R. McKeen, Anton Mayer & H. Hulman, and held by the Vigo County National bank—

One note dated March 3rd, 1890, to R. Nixon, due in sixty days after date for five (5,000) thousand dollars endorsed by R. Nixon, Willard Kidder, H. Hulman, D. W. Minshall & William R McKeen and held by the Terre Haute savings bank—

One note dated March 3rd, 1890, to the Terre Haute savings bank due sixty days after date for five thousand (5,000) dollars and endorsed by the parties last above named—

One note dated February 22nd, 1890, to R. Nixon due thirty days after date for five thousand (5,000) dollars endorsed by R. Nixon, D. W. Minshall, William R. McKeen, H. Hulman, and Willard Kidder and held by the Vigo County National bank—

One note dated February 5th, 1890, to R. Nixon, due in 60 days after date for five thousand (5,000) dollars and endorsed by the parties last above named and held by the said Vigo County National bank—

And whereas the said company has been & still is unable to pay said notes as they have matured and will not be able to pay such of said notes as they may mature in the future and the said indorsers have proposed to procure forbearance in the collection of said notes or to procure renewals thereof if said company will agree to indemnify and save harmless said endorsers from any and all loss or damage on account of said indorsements and from any and all loss or damage on account of any monies said indorsers may be

15 required to pay on account of the renewal or renewals of any such notes and any and all loss or damage on account of any monies advanced from time to time by said endorsers or either of them to pay any debts of said company now existing or that may hereafter be contracted.

And whereas said company — proper action of its stockholders and directors has agreed and does hereby agree upon demand to fully indemnify and save harmless said indorsers and each and every one of them from any loss or damage on account of any or all of the items or things hereinbefore recited and *and* has also agreed and doth hereby agree that it will pay interest at the rate of seven per cent. per annum on all monies advanced for it by said indorsers or either of them pursuant to the terms thereof,

And whereas to secure the faithful performance of the covenant and agreements hereinbefore recited it has been agreed by and between said company and said R. Nixon, William R. McKeen, H. Hulman, Willard Kidder, Anton Mayer and D. W. Minshall,

endorsers as aforesaid, that said company should execute a mortgage to Buena V. Marshall, as trustee for said endorsers, conveying the property herein before described.

Now, therefore, the Sanford Fork and Tool Company aforesaid doth hereby mortgage and warrant unto Buena V. Marshall, trustee as aforesaid, the following real estate situate in the county of Vigo, State of Indiana, to wit:

Commencing at a point 680 feet east, and one thousand three hundred and twelve (1,312) feet & six inches (6) south of a stone planted at the intersection of the east line of First street, in the city of Terre Haute, Vigo county, Indiana, & the center line of Hul-
16 man street, city of Terre Haute, Vigo county, Indiana, thence south four hundred and thirty-six (436) feet & six (6) inches, thence west three hundred (300) feet, thence north four hundred and thirty-six (436) feet and six inches (6), thence east three hundred feet (300) to the place of beginning, containing three acres (3), more or less, with all the buildings, offices, shops, engine & boilers, machinery, fixtures & appurtenances on said real estate.

And it is hereby expressly understood and agreed that if at any time the said mortgagor make default in the performance on its part of any of the covenants and agreements of this mortgage as recited in the preamble hereto—then the said trustee upon request of the part- or parties to whom anything may be due and owing pursuant to the terms hereof shall forthwith proceed to foreclose this mortgage and collect the money so due from said mortgagor, and said trustee shall from time to time upon like request, and so often as it may be necessary, foreclose this mortgage and recover from said mortgagor any and all amounts for which it may be liable under the terms hereof—and the mortgagor hereby expressly agrees upon demand to pay any and all such amounts with interest as aforesaid to said trustee, together with attorney's fees and the charges made by and allowed to said trustee for his services in this behalf, and to pay any and all such amounts without relief from valuation or or appraisement laws.

In witness whereof, the said Sansord Fork & Tool Company hath caused this instrument to be executed by its president and its corporate seal to be hereunto affixed by its secretary.

Per WILLARD KIDDER, *Pres.*

[SEAL.] ROBERT NIXON, *Sec'y.*

17 STATE OF INDIANA,)
County of Vigo,) *ss:*

Before me, the undersigned, a notary public in and for said county and State, this 21st day of March, A. D. 1890, personally appeared Willard Kidder, president, and Robert Nixon, secretary, of the Sanford Fork & Tool Company, and acknowledged that they executed the foregoing mortgage for and in behalf of said company

and as its free and voluntary deed for the uses and purposes therein set forth.

Witness my hand and notarial seal.

[NOTARIAL SEAL.] J. IRVING RIDDLE,
Notary Public.

The interlineations on page- 1, 2, 4, & five of this mortgage were made before execution.

[NOTARIAL SEAL.] J. IRVING RIDDLE,
Notary Public.

Received for record May 1st, 1890, at 3 o'clock p. m.
LEVI HAMMERLY, *Recorder.*

Record No. 1, pages 422, 423, 424, & 425.

18 And afterwards, to wit, at the May term of said court, on the 1st day of September, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by McDonald, Butler & Snow, their solicitors, and enter their appearance herein.

And afterwards, to wit, at the May term of said court, on the 4th day of October, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by George A. Knight and McDonald, Butler & Snow, their solicitors, and file their demurrer to the bill of complaint herein in the words following, to wit:

Demurrer of Certain Defendants to the Bill of Complaint in the Above-entitled Cause.

The Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, and William Kidder, and John W. Davis, receiver of the Sanford Fork and Tool Company, defendants in the above-entitled bill of complaint, jointly and severally demur to said bill of complaint and assign for cause of demurrer—

That said bill of complaint is not sufficient in law to entitle the complainants or either of them to the relief sought;

And that the said bill of complaint does not state facts sufficient to constitute a cause of complaint against the defendants or either of them.

McDONALD, BUTLER & SNOW AND
GEORGE A. KNIGHT,
Solicitors for said Demurring Defendants.

19 Come now McDonald, Butler & Snow, of counsel for the above-named demurring defendants, and certify that in their opinion the above demurrer is well founded in point of law.

McDONALD, BUTLER & SNOW,
Of Counsel for said Demurring Defendants.

STATE OF INDIANA,)
Vigo County,) *ss:*

William R. McKeen, being duly sworn, upon his oath says that he is one of the above-named demurring defendants, and that the said above-named demurrer is not interposed for delay, and further saith not.

WILLIAM R. McKEEN.

Subscribed and sworn to before me this 17th day of September, 1890.

HORACE M. SCOTT, [SEAL.]
Notary Public.

And afterwards, to wit, at the November term of said court, on the 9th day of December, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and thereupon the court, being sufficiently advised in the premises, doth now overrule the demurrer of the defendants to the bill of complaint herein.

20 And afterwards, to wit, at the November term of said court, on the 19th day of December, 1890, before Honorable William A Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver, &c., by McDonald, Butler & Snow and George A. Knight, their solicitors, and file their answer herein in the words following, to wit:

Answer of Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork & Tool Company, to complainants' bill of complaint.

The defendants, Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork & Tool Company, now and at all times saving and reserving unto themselves and to each of them
21 all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imper-

fections in the said bill of complaint, for answer thereunto, or unto so much thereof as these defendants are advised it is material or necessary to make answer unto, answering, say:

1. Respondents admit that complainant Howe, Brown & Co., Limited, is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the city of Pittsburg, in the said State of Pennsylvania; that the complainant The Cortland Top and Rail Company, Limited, is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State and of the city of Cortland therein; that the complainant Theodore Stevenson, a natural person, is a citizen and resident of the State of New York and of the city of Cortland therein; that the respondent the said Sanford Fork and Tool Company is a corporation duly organized under the laws of the State of Indiana and is a citizen and resident of said State of Indiana and at the city of Terre Haute, in said State, and that the other respondents hereinabove named are each and all citizens and residents of the said State of Indiana and of the said city of Terre Haute, in said State, and that for and during the period of about eighteen months next prior to May 13, 1890, the said respondent, Sanford Fork and Tool Company, had been and was carrying on in said city of Terre Haute, Indiana, the business of manufacturing and selling forks, hoes, shovels, rakes, picks, and other implements and tools of a similar kind.

2. Respondents admit that complainant Howe, Brown & Co., Limited, in the years 1889 and 1890, sold and delivered to said
22 respondents, the Sanford Fork and Tool Company, the following bills of merchandise, to wit:

December	10, 1889,	merchandise	amounting	to.....	$1,324 01
"	20, 1889,	"	"	".....	685 19
January	9, 1890,	"	"	".....	692 79
"	25, 1890,	"	"	".....	1,117 82
"	31, 1890,	"	"	".....	568 15
February	7, 1890,	"	"	".....	599 65
March	7, 1890,	"	"	".....	572 84
March	13, 1890,	"	"	".....	438 33
	Making an aggregate sum of.....				$5,998 78
	Which said aggregate was credited March 3, 1890, by merchandise returned.....				469 40
	Which subtracted leaves total aggregate of merchandise purchased and retained.....				$5,529 38

That the said respondent, Sanford Fork and Tool Company, executed and delivered to said complainant, Howe, Brown & Co., Limited, its notes for said merchandise so purchased, the said notes so executed and delivered, as respondents are informed and believe, aggregating about the sum of $5,565.33.

3. Respondents aver that the said complainant, Cortland Top and Rail Company, Limited, did not as in said bill of complaint averred sell

and deliver to the said respondent, Sanford Fork and Tool Company, any merchandise whatever, but that, on the contrary, all of the indebtedness due from said respondent, Sanford Fork and Tool Company, to said complainant, Cortland Top and Rail Company, Limited, is due upon accommodation paper and not otherwise; that the notes
23 now held by said complainant, Cortland Top and Rail Company, against said respondent, Sanford Fork and Tool Company, are accommodation paper and do not represent any merchandise ever sold or delivered to the Sanford Fork and Tool Company by said complainant, Cortland Top and Rail Company; that while the said respondent, Sanford Fork and Tool Company, was carrying on its business it became and was the custom and habit of said respondent and said Cortland Top and Rail Company to exchange accommodation paper—that is to say, the Cortland Top and Rail Company would execute its notes to the Sanford Fork and Tool Company, and in return the Sanford Fork and Tool Company would execute its notes for like amounts to the Cortland Top and Rail Company, the two corporations simply exchanging each other's paper as accommodation paper; that under this custom of exchange of accommodation paper said respondent, Sanford Fork and Tool Company, executed and delivered its accommodation notes to the said Cortland Top and Rail Company at the several dates and for the several amounts hereinafter stated, to wit:

December, 30, 1889, due May 5, 1890	$642 75
" 30, 1889, due May 12, 1890	595 25
" 30, 1889, due May 20, 1890	648 50
" 30, 1889, due May 28, 1890	613 50
February 4, 1890, due May 25, 1890	642 50
" 4, 1890, due May 31, 1890	600 00
" 4, 1890, due June 5, 1890	607 50
" 4, 1890, due June 7, 1890	650 00
Making an aggregate sum of about	$5,000 00

4. Respondents further aver that the indebtedness of said
24 respondent, Sanford Fork and Tool Company, to complainant Theodore Stevenson also arose from an exchange of accommodation paper between said Stevenson and said respondent, The Sanford Fork and Tool Company; that the said respondent, Sanford Fork and Tool Company, had the same custom and usage of exchanging accommodation paper with the said complainant, Stevenson, that it had with the said complainant, The Cortland Top and Rail Company, as hereinabove in this answer set forth; that the notes now held by said complainant, Stevenson, against said respondent, Sanford Fork and Tool Company, are accommodation paper so executed and delivered to said complainant, Theodore Stevenson, by respondent Sanford Fork and Tool Company under such custom and usage; that under said custom and usage said respondent, The Sanford Fork and Tool Company, executed and delivered to said

complainant, Theodore Stevenson, its accommodation notes at the dates and for the amounts hereinafter stated, to wit:

January 15, 1890, due May 18, 1890	$297 13
" 16, 1890, due May 19, 1890	208 98
February 5, 1890	199 00
February 12, 1890, due June 20, 1890	159 00
February 8, 1890	223 00
" 15, 1890, due June 18, 1890	203 00
Making an aggregate amount of about	$1,290 11

5. Respondents aver that all of the indebtedness of respondent Sanford Fork and Tool Company to said complainants, Howe, Brown & Co., Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, accrued and existed prior to March 17, 1890, the date of the execution of the mortgage of respondent Sanford Fork and Tool Company to respondent Buena V. Marshall, trustee, for the use and benefit of respondents as indorsers for said
25 Sanford Fork and Tool Company, as hereinafter stated and set forth, and that no part of the indebtedness now held and claimed against respondent Sanford Fork and Tool Company by the said complainants, Howe, Brown & Co., Limited, Cortland Top and Rail Co., Limited, and Theodore Stevenson, was incurred or accrued subsequent to the execution by said Sanford Fork and Tool Company of said indemnity mortgage to Buena V. Marshall, trustee, and that neither of said three complainants extended any credit whatever to said respondent, Sanford Fork and Tool Company, after the execution of said indemnity mortgage.

6. Respondents admit that on and prior to March 17, 1890, respondents William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, and Willard Kidder, and one Robert Nixon were stockholders in said respondent corporation, The Sanford Fork and Tool Company, and that on and prior to said March 17, 1890, respondents McKeen, Hulman, Minshall, and Kidder, together with one Robert Nixon, constituted the board of directors of said respondent corporation, The Sanford Fork and Tool Company.

7. That said respondent corporation, Sanford Fork and Tool Company, in addition to the means derived by it from its capital stock and from its bonded indebtedness, which bonded indebtedness is hereinafter mentioned and described, needed and required to have large sums of money from the fact that it required a very large capital to enable said respondent corporation to keep a sufficient stock of material on hand to successfully run and operate its manufacturing establishment; that said respondent corporation was therefore under the necessity of from time to time borrowing money; that, it then being a comparatively new enterprise and without a
26 well-established market for its products, it was obliged to procure endorsers upon its paper for the purpose of procuring the necessary capital with which to vigorously and successfully prosecute its corporate business; that certain of its stockholders and

officers, having full faith and confidence in the ability of said respondent corporation, Sanford Fork and Tool Company, to build up a successful and profitable manufacturing business if it could procure the necessary funds, at the request of the managers of said respondent corporation indorsed its notes for large amounts of money, at the several dates and in the several amounts hereinafter named, to wit:

One note to the Terre Haute savings bank for $5,000, dated September 18, 1889, due five months from date, indorsed by respondents William R. McKeen, H. Hulman, Willard Kidder, and one Robert Nixon, a stockholder and officer of said respondent corporation.

One note to the Terre Haute savings bank, dated September 18, 1889, due six months after date, for $5,000, and endorsed by the parties last above named.

One note executed to R. Nixon, a stockholder and officer of said respondent corporation, dated December 14, 1889, due March 15, 1890, for $15,000, endorsed by the said R. Nixon and by respondents H. Hulman and William Kidder, said note being held by the Vigo County National bank.

One note to the said R. Nixon, dated January 21, 1890, due 60 days after date, for $5,000, endorsed by the said Nixon and by respondents McKeen, Hulman, and Kidder, said note being held by the Terre Haute savings bank.

One note to respondent D. W. Minshall, dated January 21, 1890, due thirty days after date, for $4,000, endorsed by respondents
27 Minshall, Hulman, McKeen, and Kidder, said note being held by the First National Bank of Brazil.

One note dated January 30th, 1890, to the said R. Nixon, due ninety days after date, for $15,000, and endorsed by said Nixon and by respondents Kidder, McKeen, Mayer, and Hulman, said note being held by the Vigo County National bank.

One note dated February 5, 1890, to the said R. Nixon, due sixty days after date, for $5,000, and endorsed by the said Nixon and by respondents Minshall, McKeen, Hulman, and Kidder, said note being held by the Vigo County National bank.

One note dated February 2, 1890, to the said R. Nixon, due 30 days after date, for $5,000, indorsed by the said Nixon and by respondents Minshall, McKeen, Hulman, and Kidder, said note being held by the Vigo County National bank.

One note dated March 3, 1890, to the said R. Nixon, due sixty days after date, for $5,000, endorsed by the said Nixon and by respondents Kidder, Hulman, Minshall, and McKeen, said note being held by the Terre Haute savings bank.

One note dated March 3, 1890, to the Terre Haute savings bank, due sixty days after date, for $5,000, and endorsed by the said Robert Nixon and by respondents Kidder, Hulman, Minshall, and McKeen.

Said ten notes aggregating the sum and amount of..... $69,000

Respondents aver that all of the money procured by means of said notes was expended upon and went directly into the property

and material of said respondent corporation, Sanford Fork and Tool Company.

That at the time said respondents became endorsers for and lent their credit to said respondent corporation, Sanford Fork and
28 Tool Company, said corporation was a "going concern," in full operation, with property and means, as respondents believed, amply sufficient to pay all of its indebtedness if its property was worth what it had cost in cash; that respondents then believed the property of said corporation to be worth what it had cost in cash, and that at that time respondents, as stockholders and directors of said corporation, believed it to be solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products; that prior to the time at which said notes so endorsed, as hereinabove stated, began to mature respondents were informed by the managers of said respondent corporation, Sanford Fork and Tool Company, that it would be unable to pay said notes at maturity and would need to have said notes as they matured renewed or the time of payment thereof extended; that thereupon, on March 1, 1890, the directors of said respondent corporation, Sanford Fork and Tool Company, called a special meeting of the stockholders of said corporation to be held on March 15, 1890, a copy of which action of said directors, marked Exhibit "A," is attached hereto and hereby made part of this answer.

That the only capital stock of said respondent corporation, Sanford Fork and Tool Company, was $100,000.00, divided into 2,000 shares of $50 each; that afterwards said capital stock was increased to $150,000.00, divided into 3,000 shares of $50 each.

That on March 15, 1890, the stockholders of said respondent corporation, Sanford Fork and Tool Company, held a meeting pursuant to said call of said directors, at which meeting 2,250 shares, being a very large majority of all the capital stock of said corporation, were represented; that said stockholders at said meeting passed a resolution authorizing the directors of said corporation to execute a mortgage or mortgages upon all or any part of the property of the corporation, real or personal, or both, to se-
29 cure any new indebtedness or liability that might be thereafter incurred, or the renewal and extension of any present indebtedness or liability of the corporation, or any indebtedness thereof that might exist at the time such mortgage or mortgages might be executed. A copy of the proceedings of said stockholders' meeting, marked Exhibit "B," is attached hereto and hereby made part of this answer.

That on said March 15, 1890, the board of directors, after said stockholders' meeting, met and, pursuant to the authority given by said stockholders' meeting, adopted a resolution authorizing and directing the president and secretary of said respondent corporation to execute and deliver to Buena V. Marshall, as trustee, a mortgage to indemnify and save harmless the said endorsers or either of them from any and all payments made or liability assumed by them or either of them in behalf of said corporation, a

copy of the proceedings of which said meeting of the board of directors of said respondent corporation, marked Exhibit "C," is attached hereto and hereby made part of this answer.

That prior to and at the time of said stockholders' meeting and said directors' meeting of March 15, 1890, it was understood by the stockholders and the directors of said respondent corporation that the endorsers of said notes hereinabove mentioned proposed and agreed that they would procure forbearance or extension of time in the collection of said notes, or would procure renewals thereof if said corporation would indemnify them by mortgage against any loss or damage that they might sustain by reason of said endorsements, or by reason of any renewal or renewals of said notes, or by reason of any other payment or payments that they or either of them might make on account of the indebtedness of said corporation then existing or thereafter contracted.

That, pursuant to said authority so given by the stock-
30 holders and directors of said respondent corporation, the president and secretary of said respondent corporation did make, execute, and deliver to Buena V. Marshall, trustee, an indemnity mortgage to indemnify and hold harmless respondents McKeen, Hulman, Kidder, Mayer, and Minshall and one Robert Nixon against any loss by reason of their said endorsements hereinabove mentioned, the said mortgage also securing as an indemnity the repayment by said respondent corporation, Sanford Fork and Tool Company, of any sum or sums of money that might thereafter be advanced to said corporation or paid out by said endorsers or either of them upon the indebtedness of said corporation then existing or which might thereafter be contracted, a copy of which indemnity mortgage, marked Exhibit "D," is hereto attached and hereby made part of this answer, said mortgage bearing date of March 17, 1890, and being executed and acknowledged March 21, 1890, and duly recorded on May 1, 1890.

That at the time of the execution and delivery of said mortgage said respondent, Sanford Fork and Tool Company, was in full operation as a "going concern," with property and means sufficient to pay its indebtedness if the cash cost of said property and *and* materials could be obtained therefor; that respondents then believed the property of said corporation to be worth what it had cost in cash, and believed said corporation to be solvent, and that said corporation continued to be such going concern and carried on its business in the usual way and met all its obligations (other than the notes embraced in said indemnity mortgage) as they matured in the usual course of business until the application for and appointment of the receiver hereinafter referred to; that the amount so paid out by said corporation in the usual course of business and in paying its current operating expenses and maturing obligations between March 21, 1890, the date of the execution and delivery of said indemnity mortgage, and May 13, 1890, the date of the appointment of Davis as receiver of said corporation, was and is, as respondents are informed and believe, the sum of $30,000.00 or more.

That said respondents then believed that it was only necessary to tide said corporation over a temporary embarrassment until it could succeed in establishing a favorable footing in the market for the sale of its manufactured products.

That said respondents accepted and received said indemnity mortgage so executed and delivered in their behalf in the utmost good faith and with full and complete knowledge that every dollar of the money obtained by means of the notes upon which said respondents had become liable as such endorsers had been properly appropriated to and had gone into the property and material
31 of the said respondent corporation.

8. Respondents further aver that, relying upon said mortgage, they did procure the renewal of the said two notes of September 18, 1889, for $5,000 each, hereinabove mentioned, said renewals being endorsed by respondents Kidder, Hulman, McKeen, Mayer, and Minshall, and also by one H. S. Deming, a stockholder of said respondent corporation.

That they also procured the renewal of said note of December 14, 1889, for $15,000, said renewal being endorsed by respondents Kidder, Hulman, and Mayer, and also by Josephus Collett and Robert Nixon, stockholders of said corporation.

That they also procured the renewal of the said notes herein above mentioned, one dated January 30, 1890, for $5,000, and one dated *and* January 21, 1890, for $5,000, said renewals being endorsed by respondents Kidder, Hulman, McKeen, Mayer, and Minshall, and also by H. S. Deming, a stockholder of said corporation.

That, relying upon said mortgage, said respondents, Minshall, McKeen, Kidder, and Hulman, paid off the said note of January 22, 1890, for $4,000, hereinabove mentioned, said payment being made June 11, 1890; that they procured the renewal of the said note of February 5, 1890, hereinabove mentioned, the said renewal note being endorsed by Kidder, Minshall, Hulman, McKeen, Mayer, and also by H. S. Deming, a stockholder of said corporation.

That they procured the renewal of the note of February 22, 1890, for $5,000, hereinabove mentioned, the renewal note being endorsed by respondents Kidder, Minshall, Hulman, McKeen, and
32 Mayer, and also by H. S. Deming, a stockholder of said corporation.

That said respondents, relying upon said mortgage, paid off the two notes dated March 3, each for $5,000, hereinabove described, said payment of said two notes being made by said respondents on June 1, 1890, and June 11, 1890.

That respondents other than said corporation have, relying upon said mortgage, paid off each and every of said renewal notes; that the said Robert Nixon has not paid any part of any or either of said notes upon which he was endorser or surety, as hereinabove mentioned, but that all of said notes, aggregating the full sum of $69,000, have been paid or caused to be paid by said respondents other than said Sanford Fork and Tool Company in reliance upon said indemnity mortgage as their indemnity for such payment.

(Respondents further aver that on March 17, 1890, the day of the

date of said indemnity mortgage, respondents Kidder and Hulman, at the instance and request of said respondent corporation, advanced their credit to said corporation by becoming liable upon two notes each for $3,000, one due in five days after date and the other due in ten days after date, and that they, the said respondents Kidder and Hulman, have paid said two notes in good faith, relying upon said mortgage as their security for repayment. Said two notes, taken together with the notes hereinabove mentioned, make the total sum advanced and paid out by said respondents for and in behalf of the said Sanford Fork and Tool Company aggregate and amount to $75,000.)

9. Respondents further aver that the said indemnity mortgage dated March 17, 1890, was and is a second mortgage upon all of the real estate and property described therein and covered
33 thereby and was and is subject to a prior and first mortgage or deed of trust made, executed, and delivered on July 2, 1888, by the respondent corporation, Sanford Fork and Tool Company, to Domas Deming, trustee, to secure the payment of fifty bonds for $1,000 each, dated July 2, 1888, payable July 2, 1898, with interest at the rate of six per cent. per annum, payable semi-annually, on the second days of January and July of each year, interest coupons being attached to said bonds.

And respondents aver that all of the bonds secured by said prior first mortgage or deed of trust were issued and sold shortly after the date thereof, and are now outstanding for value, and are a first and prior lien upon all the property mentioned and described in the said indemnity mortgage dated March 17, 1890, executed and acknowledged March 21, 1890, and duly recorded May 1, 1890. A true copy of said first mortgage or deed of trust is hereto attached, marked Exhibit "E," and is hereby made part of this answer.

Respondents further aver that said indemnity mortgage did not cover or convey to said Buena V. Marshall, trustee, all or anything like or near to all of the property of and belonging to said respondent corporation, Sanford Fork and Tool Company, but, on the contrary, left unconveyed by said indemnity mortgage all of the merchandise, manufactured products, materials, furniture, bills receivable, accounts receivable, and a large tract of timber land of some four hundred acres, situated in Daviess county, Indiana, of and belonging to the said corporation, and amounting in value to far more than the total sum secured by said indemnity mortgage.

That said indemnity mortgage was not recorded for about forty days after its execution and acknowledgment, said mortgage being executed and acknowledged March 21, 1890, and being duly
34 recorded on May 1, 1890; but respondents aver that said indemnity mortgage was duly recorded within the time allowed by law for the recording of such instruments, and that the delay in recording said mortgage was not occasioned by any purpose, desire, or intention of said respondents or either of them to conceal the existence of said mortgage or to induce any person or persons or corporation to give credit to said respondent corporation in ignorance of the existence of said indemnity mortgage.

Respondents further aver that neither of said complainants did give or extend to said corporation any additional credit, or sell to said respondent corporation any goods or merchandise whatever after the execution and delivery of said indemnity mortgage.

Respondents further aver that on or about May 7, 1890, a suit was instituted in the Vigo circuit court of Vigo county, Indiana, wherein The National State Bank of Terre Haute was plaintiff and the said respondent corporation, Sanford Fork and Tool Company, and others were defendants, said suit being founded upon certain promissory notes due from said respondent corporation to said plaintiff; that such proceedings were had in said suit that on or about May 13, 1890, John W. Davis was appointed by the Vigo circuit court a receiver to take charge of all the assets of said respondent corporation, Sanford Fork and Tool Company; that said receiver duly accepted his trust and filed the necessary bond, and took charge and possession of all of the assets and property of and belonging to said respondent corporation, Sanford Fork and Tool Company.

That thereafter, pursuant to the orders and directions of the Vigo circuit court, the said receiver made out and filed an inventory and appraisement of all of the property of and belonging to
35 said respondent corporation.

That, pursuant to the orders and directions of the Vigo circuit court, the said receiver caused such property so taken possession of by him as such receiver to be duly and legally appraised by John O'Neil and William Riley, good and competent appraisers.

That said appraisers appraised the merchandise, manufactured articles, and materials on hand of and belonging to said respondent corporation at the sum of..... $67,336 23
Bills receivable belonging to said corporation..... 588 64
Accounts " " " " 14,617 13
Office furniture " " " 1,078 85
Timber land in Daviess county, Indiana, owned by said respondent corporation..... 4,770 00

Making in the aggregate property to the appraised value of..... $88,390 85

not covered or conveyed by said indemnity mortgage.

That said appraisers appraised the value of the real estate, buildings, machinery, and fixtures covered and conveyed by said indemnity mortgage at a total valuation of $116,055.39.

That respondents believe that said appraisements so made were fair, just, and correct, and with reasonable accuracy represented the fair market value of said property scheduled in said appraisements, but respondents do not intend to be understood as meaning that said property at forced or judicial sale would have realized the full amount of said appraisements.

Respondents aver that all of the property covered and conveyed by said indemnity mortgage was and is subject to the first and prior mortgage or deed of trust securing the payment of $50,000.00, to-

gether with accrued interest thereon, the description in said two mortgages being precisely the same.

Respondents therefore aver and show the court that the property covered by the said indemnity mortgage and also by said first mortgage, at the appraisement thereof made by the receiver, was and is insufficient to pay and satisfy the principal sum secured by said first mortgage and the amount of $75,000.00 in addition
36 thereto paid out by said respondents as endorsers relying upon said indemnity mortgage.

And respondents further aver and show the court that in taking said indemnity mortgage they acted in the utmost good faith with and towards all other creditors of said respondent corporation, Sanford Fork and Tool Company; that they left uncovered and unconveyed by their indemnity mortgage a far greater proportion of the assets of said corporation in proportion to the remaining unsecured indebtedness of said corporation than they took in taking said indemnity mortgage, and that all of the indemnity and security they did take was and is subject to the first and paramount lien of said first mortgage and deed of trust securing the payment of $50,000 and accrued interest thereon, which said first mortgage or deed of trust said respondents were and are obliged to protect and pay in order to avail themselves of any security whatever under said indemnity mortgage.

Respondents further aver that they are informed and believe, and upon information and belief aver the fact to be, that the custom and usage of respondent corporation, Sanford Fork and Tool Company, and complainants Cortland Top and Rail Company and Theodore Stevenson to exchange accommodation paper, as hereinabove stated, grew out of the fact that citizens and residents of the city of Cortland, New York, who were pecuniarily interested in the complainant corporation, Cortland Top and Rail Company, were largely instrumental in the creation and incorporation of respondent corporation, Sanford Fork and Tool Company, more than one-half of the original $100,000 of capital stock of said respondent corporation having been subscribed by E. O. Richard and A. H. Day, citizens and residents of Cortland, New York, both of whom were
37 members of the first board of directors of said respondent corporation, Sanford Fork and Tool Company.

Respondents aver that their entire action in the premises was and has been in the utmost good faith upon their part and without fraud, collusion, concealment, conspiracy, or any purpose, desire, or intention to wrongfully deceive or defraud any creditor of said respondent corporation, Sanford Fork and Tool Company; that they lent their credit to and advanced and paid out their money for the benefit of said respondent corporation in perfect good faith and with the sole purpose and intention of enabling said respondent corporation, Sanford Fork and Tool Company, to establish and successfully and properly operate a profitable manufacturing industry; that at the time they became liable for the large sums of money hereinabove mentioned and stated and at the time said indemnity mortgage was executed and delivered they fully believed that said respondent cor-

poration, Sanford Fork and Tool Company, would, with respondents' help in renewing and carrying for said respondent corporation some $75,000 of its indebtedness, be enabled to continue in full operation, and that it would ultimately be able to control a valuable and profitable trade and work its way out from under its entire indebtedness, and that they then fully believed that said respondent corporation had property and assets amply sufficient at the cost price thereof to equal and exceed all of its indebtedness, and that they then fully believed the property and assets of said corporation to be worth as a manufacturing plant the cost price thereof.

Respondents further aver and show the court that no acts whatever of actual fraud, wrong-doing, or misrepresentation are charged or averred against them or either of them by complainants in their said bill of complaint herein; that the sole and only charge or averment made by complainants in support of the prayer of their
38 said bill of complaint that the court might decree said indemnity mortgage void and cancel the same is that respondents McKeen, Hulman, Minshall, Mayer, and Kidder were stockholders in and that respondents McKeen, Minshall, and Kidder were directors of said respondent corporation, Sanford Fork and Tool Company, at the time they became liable as endorsers for said respondent corporation and at the time the said indemnity mortgage was executed and delivered by said respondent corporation, Sanford Fork and Tool Company, to the said Marshall, trustee, for the benefit and protection of said respondents as such endorsers.

Respondents aver that the fact that they were stockholders in and directors of said respondent corporation, Sanford Fork and Tool Company, at the time they became liable as endorsers for said respondent corporation and at the time said indemnity mortgage was executed and delivered did not, either at law or in equity, estop or prevent them from lending their credit or their money to said respondent corporation and taking from said respondent corporation such indemnity and security as any other person, persons, or strangers might lawfully have taken to secure themselves against loss by reason of credit lent or money advanced to said respondent corporation.

Wherefore and by reason of the facts in this answer set forth respondents aver that said indemnity mortgage executed and delivered by said respondent corporation, Sanford Fork and Tool Company, to respondent Buena V. Marshall, trustee, was and is a legal, valid, and binding mortgage, and was and is a legal and valid security for the benefit of respondents McKeen, Hulman, Minshall, Mayer, and Kidder to secure them so far as the property conveyed by said indemnity mortgage, subject to the prior lien of said first mortgage thereon will secure them against loss by reason of their said
39 endorsements and their said payment of over $75,000 upon and by reason of their said endorsements, as hereinabove stated.

And now, having fully answered said bill of complaint herein, respondents submit that complainants are entitled to no other or further answer from them or either of them, and pray to be hence

dismissed with their reasonable costs and charges; and respondents will ever pray.

McDONALD, BUTLER & SNOW AND
GEORGE A. KNIGHT,
Solicitors for Respondents.

40 *Verification of Answer as Amended.*

STATE OF INDIANA, } ss:
Vigo County, }

Before me, Isaac H. C. Royse, a notary public, personally appeared William R. McKeen, Delos W. Minshall, Anton Mayer, and Willard Kidder, and each, separately and severally being first duly sworn, upon oath says that he has carefully read over the above and foregoing answer as amended, and that the same is true so far as averred upon knowledge of the respondents, and that so far as the same is averred to be upon information and belief he believes the same to be true.

WILLIAM R. McKEEN.
WILLARD KIDDER.
DEPOSS W. MINSHALL.
ANTON MAYER.

Subscribed and sworn to before me, a notary public, this 3rd day of April, 1891.

Witness my hand and notarial seal.

ISAAC H. C. ROYSE, [SEAL.]
Notary Public.

41 STATE OF INDIANA, } ss:
Vigo County, }

Before me, Isaac H. C. Royce, a notary public in and for said county and State, personally appeared Wm. R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, and Willard Kidder, and each, separately and severally being first duly sworn, upon oath says that he has carefully read over the above and foregoing answer, and that the same is true so far as averred upon knowledge of the respondents, and that so far as the same is averred to be upon information and belief he believes the same to be true.

WM. R. McKEEN.
H. HULMAN.
D. W. MINSHALL.
ANTON MAYER.
WILLARD KIDDER.

Subscribed and sworn to before me, Isaac H. C. Royce, a notary public, this 18th day of December, 1890.

Witness my hand and notarial seal.

ISAAC H. C. ROYCE, [SEAL.]
Notary Public.

42 (EXHIBIT "A.")

TERRE HAUTE, IND., *M'ch* 1, 1890.

At a meeting of the directors of the Sanford Fork and Tool Company, held on the foregoing date, it was resolved that the president and secretary of this company be, and they are hereby, directed to call a special meeting of the stockholders of this company, to be held at the office of the company, near the city of Terre Haute, in Vigo county, Indiana, at ten o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing the execution of a mortgage or mortgages covering the property of the company and for such other business as may come before the meeting.

In accordance with foregoing resolution the following notice of meeting was either delivered by hand or mailed by registered letter to each of the stockholders, duly signed by the president and secretary, and stamped with the seal of the company:

"Pursuant to a resolution of the board of directors of this company, adopted the first day of March, A. D. 1890, you are hereby notified that there will be a special meeting of the stockholders of this company, held at the office of the company, near the city of Terre Haute, Vigo county, Indiana, at ten o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing the execution of a mortgage or mortgages covering the property of the company and for such other business as may come before the meeting."

ROBERT NIXON, *Sec'y.*
WILLARD KIDDER, *Pres.*

43 (EXHIBIT "B.")

The stockholders of the Sanford Fork and Tool Company met at the office of the company, near the city of Terre Haute, Indiana, at 10 o'clock a. m., this day, pursuant to the following notice, to wit:

"Pursuant to a resolution of the board of directors of the company, adopted the first day of March, A. D. 1890, you are hereby notified that there will be a special meeting of the stockholders of this company, held at the office of the company, near the city of Terre Haute, Vigo county, Indiana, at 10 o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing the execution of a mortgage covering the property of the company and for such other business as may come before the meeting."

On motion, Mr. Willard Kidder was called to the chair and Robert Nixon was chosen sec'y, and on motion the meeting adjourned to meet at the office of W. R. McKeen, in Terre Haute, Ind., at eleven a. m. this day.

The meeting of stockholders convened, pursuant to adjournment, at the office of W. R. McKeen, at eleven o'clock a. m., M'ch 15th, 1890.

The proceedings of last meeting of the stockholders was read and approved. Twenty-two hundred and fifty shares were represented at the meeting, either by the holders thereof in person or by good and sufficient proxies.

On motion of D. W. Minshall, seconded by Wm. R. McKeen, the following resolution was unanimously adopted:

"Resolved, That the board of directors of this company be, and they are hereby, authorized to cause to be executed a mortgage or mortgages upon all or any part of the property of this company, real or personal, or both, to secure any new indebtedness or liability of this company or any indebtedness thereof that may exist at the time such mortgage or mortgages may be executed.

"And the board of directors of this company are hereby further empowered and authorized, in their discretion, to sell, convey, or dispose of the property and assets of this company of every kind and description, or from time to time any part thereof, in such manner and upon such terms as the said directors may deem best for the interests of this company."

ROBERT NIXON, *Sec'y.*
WILLARD KIDDER, *Pres.*

(EXHIBIT "C.")

TERRE HAUTE, IND., *Mch* 15th, 1890.

The board of directors of the Sanford Fork and Tool Company met at the office of Wm. R. McKeen, in Terre Haute, Ind. A full board was present, with Pres't Willard Kidder in the chair and Sec'y Rob't Nixon acting as such. The minutes of the last meeting were read and approved.

On motion of Mr. Hulman, seconded by Mr. McKeen, the following resolution was unanimously adopted:

Whereas the company has now outstanding against it certain notes which are wholly unpaid, and certain parties are liable thereon as indorsers, but in fact as sureties for said company, the said notes and indorsements being described as follows, to wit:

One note to the Terre Haute savings bank for five thousand ($5,000) dollars, dated Sept. 18, 1889, due in five months from date, indorsed by Rob't Nixon, Wm. R. McKeen, H. Hulman, and Willard Kidder.

One note to the Terre Haute savings bank, dated Sept. 18, 1889, due in six months from date, for five thousand ($5,000) dollars, and endorsed by the parties last above named.

One note to Robert Nixon, dated December 14th, 1889 (due on or before after date), for fifteen thousand ($15,000.00) dollars, endorsed by R. Nixon, H. Hulman, and Willard Kidder, and held by the Vigo County National bank.

One note to Robert Nixon, dated January 21st, 1890, due thirty days after date, for four thousand ($4,000.00) dollars, endorsed by D.

W. Minshall, H. Hulman, Wm. R. McKeen, and Willard Kidder, and held by the First National Bank of Brazil, Indiana.

One note dated January 30th, 1890, to Robert Nixon, due in
46 ninety days after date, for fifteen thousand (15,000.00) dollars, endorsed by R. Nixon, Willard Kidder, Wm. R. McKeen, Anton Mayer, and H. Hulman, and held by the Vigo County National bank.

One note dated March 3d, 1890, to Robert Nixon, due sixty days after date, for five thousand (85,000) dollars, endorsed by Robert Nixon, Willard Kidder, H. Hulman, D. W. Minshall, and Wm. R. McKeen, and held by the Terra Haute savings bank.

One note dated March 3d, 1890, to the Terre Haute savings bank, due sixty days after date, for five thousand (5,000) dollars, and endorsed by the parties last above named.

One note dated February 22nd, 1890, to Robert Nixon, due thirty days after date, for 85,000, endorsed by Robert Nixon, D. W. Minshall, Wm. R. McKeen, H. Hulman, and Willard Kidder, and held by the Vigo County National bank.

One note dated February 5th, 1890, to R. Nixon, due in sixty days after date, for five thousand (85,000) dollars, endorsed by the parties last above named, and held by the said Vigo County National bank; and

Whereas this company is indebted in various other amounts to sundry persons and has been and will be unable to pay said notes as they mature and pay its other indebtedness as aforesaid, and it has been proposed by the said endorsers of said notes to procure forbearance in the collection of said notes or to procure renewals thereof if said company would indemnify them by a mortgage upon the property of said company against any loss or damage they might sustain by reason of said endorsements or either of them or by reason of any renewal of renewals of said notes or by reason
47 of any other payment or payments the said endorsers or either of them may make on account of the indebtedness of said company, now existing or hereafter contracted; and

Whereas this company has agreed to furnish such indemnity as stipulated for by said endorsers, and the stockholders of this company have authorized the execution of such mortgage security:

Now, therefore, resolved, That the president and secretary of this company be, and they are hereby, authorized and directed to execute under the corporate seal of this company and deliver to Buena V. Marshall, as trustee, a mortgage covering all the property of this company, and be of such effect in law as to fully indemnify and save harmless the said endorsers or either of them from any and all payments made or liabilities assumed by them or either of them in behalf of this company or on its account.

There being no further business, the board adjourned.

WILLARD KIDDER, *Pres't.*

ROBT NIXON, *Sec'y.*

48 (EXHIBIT D.)

This indenture, made and entered into this seventeenth day of March, A. D., eighteen hundred and ninety, by and between the Sanford Fork and Tool Company, a corporation of the State of Indiana, and Buena V. Marshall, of Vigo county, in the State of Indiana, as trustee,

Witnesseth: Whereas, the said company is indebted in a large amount to sundry persons, and a portion of such indebtedness is evidenced by certain promissory notes, endorsed by sundry persons as sureties for said company, which notes are described as follows, to wit:—

One note to the Terre Haute savings bank for five thousand ($5,000.) dollars, dated September 18th, 1889, due in five months from date, endorsed by R. Nixon, William R. McKeen, H. Hulman and Willard Kidder.

One note to the Terre Haute savings bank, dated September 18th, 1889, due in six months from date, for five thousand ($5,000.) dollars, and endorsed by the parties last above named.

One note to R. Nixon, dated December 14th, 1889, due on or before March 15th, 1890, for fifteen thousand ($15,000.) dollars, endorsed by R. Nixon, H. Hulman and Willard Kidder, and held by the Vigo County National bank.

One note to R. Nixon, dated January 21st, 1890, due sixty days after date, for five thousand ($5,000.) dollars, endorsed by R. Nixon, William R. McKeen, H. Hulman and Willard Kidder, and held by the Terre Haute savings bank.

One note to D. W. Minshall, dated January 21st, 1890, due thirty days after date, for four thousand ($4,000.) dollars, en-
49 dorsed by D. W. Minshall, H. Hulman, William R. McKeen and Willard Kidder, and held by the First National Bank of Brazil.

One note, dated January 30th, 1890, to R. Nixon, due in ninety days after date, for fifteen thousand ($15,000.) dollars, endorsed by R. Nixon, Willard Kidder, William R. McKeen, Anton Mayer and H. Hulman, and held by the Vigo County National bank.

One note dated March 3rd, 1890, to R. Nixon, due sixty days after date, for five thousand ($5,000.) dollars, endorsed by R. Nixon, Willard Kidder, H. Hulman, D. W. Minshall and William R. McKeen, and held by the Terre Haute savings bank.

One note dated March 3rd, 1890, to the Terre Haute savings bank, due sixty days after date, for five thousand ($5,000.) dollars, and endorsed by the parties last above named.

One note dated Feburary 22nd, 1890, to R. Nixon, due thirty days after date, for five thousand ($5,000.) dollars, endorsed by R. Nixon, D. W. Minshall, William R. McKeen, H. Hulman and Willard Kidder, and held by the Vigo County National bank.

One note dated February 5th, 1890, to R. Nixon, due in sixty days after date, for five thousand ($5,000.) dollars, endorsed by the

parties last above named, and held by the said Vigo County National bank.

And whereas, the said company has been and still is unable to pay said notes as they have matured, and will not be able to pay such of said notes as they may mature in the future, and the said endorsers have proposed to procure forbearance in the collection of said notes, or to procure renewals thereof, if said company will agree to indemnify and save harmless said endorsers from any and all loss or damage on account of said endorsements, and from any and all loss or damage on account of moneys said endorsers
50 may be required to pay on account of the renewal or renewals of any such notes, and any and all loss or damage on account of any moneys advanced from time to time by said endorsers or either of them to pay any debts of said company now existing, or that may be hereafter contracted, and

Whereas, said company, by proper action of its stockholders and directors, has agreed and does hereby agree, upon demand, to fully indemnify and save harmless said endorsers, and each and every one of them from any loss or damage on account of any or all of the items or things hereinbefore recited, and has also agreed and doth hereby agree that it will pay interest at the rate of seven per cent. per annum on all moneys advanced for it by said endorsers or either of them pursuant to the items hereof, and

Whereas, to secure the faithful performance of the covenents and agreements hereinbefore recited, it has been agreed by and between said company and said R. Nixon, William R. McKeen, H. Hulman, Willard Kidder, Anton Mayer and D. W. Minshall, endorsers as aforesaid, that said company should execute a mortgage to Buena V. Marshall, as trustee, for said endorsers, covering the property hereinbefore described:

Now, therefore, the Sanford Fork and Tool Company aforesaid doth hereby mortgage and warrant unto Buena V. Marshall, trustee as aforesaid, the following real estate, situated in the county of Vigo, and State of Indiana, to wit:

Commencing at a point six hundred and eighty (680) feet east, and one thousand, three hundred and twelve (1,312) feet and six (6) inches south of a stone planted at the intersection of the east line of First street, in the city of Terre Haute, Vigo county, Indiana, and the center line of Hulman street, city of Terre Haute, Vigo
51 county, Indiana, thence south four hundred and thirty-six (436) feet and six (6) inches, thence west three hundred (300) feet, thence north four hundred and thirty-six (436) feet and six (6) inches, thence east three hundred (300) feet to the place of beginning, containing three (3) acres, more or less, with all the buildings, offices, shops, engines and boilers, machinery, fixtures and appurtenances on said real estate.

It is hereby expressly understood and agreed that if at any time the mortgagor make default in the performance on its part of any of the covenants and agreements of this mortgage, as recited in the preamble hereto, then the said trustee, upon request of the party or parties to whom anything may be due and owing, pursuant

to the terms hereof, shall forthwith proceed to foreclose this mortgage and collect the money so due from said mortgagor, and said trustee shall from time to time, upon like request and so often as it may be necessary, foreclose this mortgage and recover from said mortgagor any and all amounts *d*or which it may be liable under the terms hereof, and the mortgagor hereby expressly agrees upon demand to pay any and all such amounts, with interest as aforesaid, to said trustee, together with attorney's fees and the charges made by and allowed to said trustee for his services in this behalf, and to pay any and all such amounts without relief from valuation or appraisement laws.

In witness whereof, the said Sanford Fork and Tool Company hath caused this instrument to be executed by its president, and its corporate seal to be hereunto affixed by its secretary.

Per WILLARD KIDDER, *Pres.*

ROBERT NIXON, *Sec.* [SEAL.]

52 STATE OF INDIANA, }
County of Vigo, } *ss:*

Before me, the undersigned, a notary public in and for said county and State, this 21st day of March, A. D. 1890, personally appeared Willard Kidder, president, and Robert Nixon, secretary, of the Sanford Fork and Tool Company, and acknowledged that they executed the foregoing mortgage for and in behalf of said company and as its free and voluntary deed for the uses and purposes therein set forth.

Witness my hand and notarial seal.

[SEAL.] IRVING RIDDLE,
Notary Public.

53 (EXHIBIT "E.")

This mortgage or deed of trust made this second day of July, 1888, between the Sanford Fork and Tool Company, a corporation organized and existing under the laws of the State of Indiana, party of the first part, and Demas Deming, trustee, of Terre Haute, Indiana, party of the second part—

Whereas the stockholders of said Sanford Fork and Tool Company, at a meeting held on June 19, 1888, and called by notice to each of the stockholders for the purpose of providing additional means to carry on the operations of the company, did by resolution adopted at said meeting, at which a majority of the stock was represented, empower and instruct the president and secretary of said company to borrow fifty thousand dollars for its use, and on the credit of said party of the first part, and to issue and sell for that purpose at not less than par its negotiable bonds secured by mortgage on the property of said party of the first part situated in the county of Vigo, State of Indiana.

And whereas in pursuance of said action of said stockholders

said party of the first part has made its fifty negotiable bonds coupon bonds of even date herewith, and numbered consecutively from one to fifty inclusive, payable to said party of the second part, trustee, or bearer, each bond being for the sum of one thousand dollars, dated the second day of July, 1888, payable on the second day of July, 1898, with interest at the rate of 6 per cent. per annum, payable semi-annually, on the second day of January and July of each year, with interest coupons attached: the principal and interest of each bond being payable at the First National Bank of Terre Haute, Indiana, without relief from valuation or appraisement laws, and—

Whereas the said party of the second part has been se-
54 lected for the purpose of receiving, holding and administering a mortgage to secure the principal and interest of said bonds, and has accepted said trust, and—

Whereas it is also provided in each of said bonds that if any installments of interest thereon or on either of them, should remain unpaid for six months after the presentment thereof for payment, then, and by reason thereof, the principal of all of said bonds shall at and upon the election of a majority in interest of the bondholders of said bonds, be and become due and payable; and that this deed of trust given to secure said bonds may thereupon be foreclosed accordingly—

Now, therefore, this deed of trust witnesseth: That the said party of the first part, in consideration of the premises, and for the sum of one dollar, the receipt whereof is hereby acknowledged, does hereby grant, bargain and sell, convey, mortgage and confirm, to said party of the second part, his heirs, successors and assigns, the following-described property situate in the county of Vigo, State of Indiana, viz:—

Commencing at a point six hundred and eighty (680) feet east and one thousand three hundred and twelve (1,312) feet and six (6) inches south of a stone planted at the intersection of the east line of First street, in the city of Terre Haute, Vigo county, Indiana, and the center line of Hulman street, city of Terre Haute, Vigo county, Indiana, then south four hundred thirty-six (436) feet and six (6) inches, thence west three hundred (300) feet, thence north four hundred thirty-six (436) feet and six (6) inches, thence east three hundred (300) feet to the place of beginning, containing three acres more or less. Also the buildings, offices, shops, engines, and
55 boilers, machinery, fixtures and appurtenances on and of said real estate, and that may be hereafter erected, constructed and acquired.

To have and to hold all of said property to the said party of the second part, his heirs and assigns forever, in trust and for the benefit of all the holders of said bonds equally. The said party of the first part and its successors hereby covenants with said party of the second part, his heirs and assigns, as such trustee, that it is lawfully possessed of all the aforesaid property as its own property, and as of a good and lawful possessory right, in accordance with the laws of

Indiana, and that it, said party of the first part, and its successors, warrant and defend the same against all claims whatsoever, provided, nevertheless, and these presents are subject to the following conditions, viz:

If the said party of the first part shall well and truly pay or cause to be paid each and every of said bonds as it falls due, and the principal thereof when it becomes due, according to the tenor and effect of said bonds and coupons to and for the benefit of the respective holders thereof for the time being, then this indenture shall become and be void, and for no effect; otherwise it shall remain in full force and virtue in law.

It is hereby stipulated and agreed that if, at any time, hereafter, the party of the first part shall make default in payment of said interest to accrue on said bonds, so that at any time two of such installments of interest shall be overdue and unpaid, then and in that case, for the purpose of foreclosure of this mortgage, and the sale of said mortgaged property, the principal of all said bonds shall be deemed and taken as due and payable, and said trustee may,
56 upon request of the holders of a majority in interest of said bonds, *shall* proceed to foreclose this mortgage. In case of death, resignation or incapacity of said party of the second part before the complete execution of his trust in the premises, it shall be competent and lawful to appoint a successor in trust, upon the written petition of a majority in interest of the holders of the bonds hereby secured and then outstanding to the circuit court of Vigo county, Indiana, designating a successor, and requesting his appointment, said court may appoint the person so designated, as such trustee. The person so appointed as trustee shall hereby, *ipso facto* be invested with all the rights, title and powers and duties that are hereby invested in the party of the second part.

In witness whereof, the Sanford Fork and Tool Company have caused these presents to be signed by its president, attested by its secretary, and the seal of the company affixed this second day of July, 1888.

[SEAL.] ROBERT NIXON, *Pres.*

Attest: A. URBAN, *Sec.*

Acknowledged before—
B. V. MARSHALL.

24 August, 1888.

57 And afterwards, to wit, at the November term of said court on the 19th day of January, 1891, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the complainants, by McNutt & McNutt, their solicitors, and file their exceptions to the answer of the defendants herein; which exceptions are in the words following, to wit:

The said complainants come now, by their solicitors, and present these their exceptions jointly to the answer of the respondents herein, heretofore filed, to complainants' bill of complaint and to each and every clause, part, and parcel of said answer and to the whole thereof, for that—

1st. They say the matters and things therein averred, pleaded, and answered are insufficient to constitute a defence to complainants' said bill or any part thereof, and of this they pray the judgment of the court.

58 2nd. The said complainants, for further exceptions to the following parts, clauses, and portions of said answer to their, complainants', bill and complaint herein, excepts thereto for the reasons that said parts, clauses, and portions of said answer, neither separately nor all together, constitute a defence to complainants' said bill and complaint or to any part thereof, to wit:

The defendants, Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork & Tool Company, now and at all times saving and reserving unto themselves and to each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint, for answer thereunto, or unto so much thereof as these defendants are advised it is material or necessary to make answer unto, answering, say:

1. Respondents admit that complainant Howe, Brown & Co., Limited, is a corporation duly organized under the laws of the State of Pennsylvania and is a citizen and resident of the city of Pittsburgh, in the said State of Pennsylvania; that the complainant The Cortland Top & Rail Company, Limited, is a corporation duly organized under the laws of the State of New York and is a citizen and resident of said State and of the city of Cortland, therein; that the complainant Theodore Stevenson, a natural person, is a citizen and resident of the State of New York and of the city of

59 Cortland, therein; that the respondent The Sanford Fork & Tool Company is a corporation duly organized under the laws of the State of Indiana and is a citizen and resident of said State of Indiana and at the city of Terre Haute, in said State, and that the other respondents hereinabove named are each and all citizens and residents of the said State of Indiana and of the city of Terre Haute, in said State, and that for and during the period of about eighteen months next prior to May 13, 1890, the said respondent, Sanford Fork & Tool Company, had been and was carrying on in said city of Terre Haute, Indiana, the business of manufacturing and selling forks, hoes, shovels, rakes, picks, and other implements and tools of a similar kind.

2. Respondents admit that complainant Howe, Brown & Co., Limited, in the years 1889 and 1890, sold and delivered to said respondents, The Sanford Fork and Tool Company, the following bills of merchandise, to wit:

December	10, 1889,	merchandise	amounting	to.....	$1,324 01
"	20, 1889,	"	"	"	685 19
January	9, 1890,	"	"	"	692 79
"	25, 1890,	"	"	"	1,117 82
"	31, 1890,	"	"	"	568 15
February	7, 1890,	"	"	"	599 65
March	7, 1890,	"	"	"	572 84
March	13, 1890,	"	"	"	438 33
	Making an aggregate sum of.....				$5,998 78
	Which said aggregate was credited March 3, 1890, by merchandise returned.....				469 40
60	Which subtracted leaves total aggregate of merchandise purchased and returned.....				$5,529 38

That the said respondent, Sanford Fork & Tool Company, executed and delivered to said complainant, Howe, Brown & Co., Limited, its notes for said merchandise so purchased, the said notes so executed and delivered, as respondents are informed and believe, aggregating about the sum of $5,565.33.

3. Respondents aver that the said complainant, Cortland Top & Rail Company, Limited, did not, as in said bill of complaint averred, sell and deliver to the said respondent, Sanford Fork & Tool Company, any merchandise whatever, but that, on the contrary, all of the indebtedness due from said respondent, Sanford Fork & Tool Company, to said complainant, Cortland Top & Rail Company, Limited, is due upon accommodation paper and not otherwise; that the notes now held by said complainant, Cortland Top & Rail Company, against said respondent, Sanford Fork & Tool Company, are accommodation paper and do not represent any merchandise ever sold or delivered to the Sanford Fork & Tool Company by said complainant, Cortland Top & Rail Company; that while the said respondent, Sanford Fork & Tool Company, was carrying on its business it become and was the custom and habit of said respondent and said Cortland Top & Rail Company to exchange accommodation paper—that is to say, the Cortland Top & Rail Company would execute its notes to the Sanford Fork & Tool Company, and in return the Sanford Fork & Tool Company would execute its notes for like amounts to the Cortland Top & Rail Company, the
61 two corporations simply exchanging each other's paper as accommodation paper; that under this custom of exchange of accommodation paper said respondent, Sanford Fork & Tool Company, executed and delivered its accommodation notes to the said Cortland Top & Rail Company at the several dates and for the several amounts hereinafter stated, to wit:

December 30, 1889, due May 5, 1890.....	$642 75
December 30, 1889, due May 12, 1890.....	959 25
December 30, 1889, due May 20, 1890.....	648 50
December 30, 1889, due May 28, 1890.....	613 50

February 8, 1890, due May 25, 1890	$642 50
February 4, 1890, due May 31, 1890	600 00
February 4, 1890, due June 5, 1890	607 50
February 4, 1890, due June 7, 1890	650 00
Making an aggregate sum of about	$5,000 00

4. Respondents further aver that the indebtedness of said respondent, Sanford Fork & Tool Company, to complainant Theodore Stevenson also arose from an exchange of accommodation paper between said Stevenson and said respondent, The Sanford Fork & Tool Company; that the said respondent, Sanford Fork & Tool Company, had the same custom and usage of exchanging accommodation paper with the said complainant, Stevenson, that it had with the said complainant, The Cortland Top & Rail Company, as hereinabove in this answer set forth; that the notes now held by said complainant, Stevenson, against said respondent, Sanford Fork & Tool Company, are accommodation paper so executed and delivered to said complainant, Theodore Stevenson, by respondent Sanford Fork & Tool Company under such custom
62 and usage; that under said custom and usage said respondent, The Sanford Fork & Tool Company, executed and delivered to said complainant, Theodore Stevenson, its accommodation notes at the dates and for the amounts hereinafter stated, to wit:

January 15, 1890, due May 18, 1890	$297 13
" 16, 1890, due May 19, 1890	208 98
February 12, 1890, due June 20, 1890	159 00
" 15, 1890, due June 18, 1890	203 00
Making an aggregate amount of about	$868 11

5. Respondents aver that all of the indebtedness of respondent Sanford Fork & Tool Company to said complainants, Howe, Brown & Co., Limited, Cortland Top & Rail Co., Limited, and Theodore Stevenson, accrued and existed prior to March 17, 1890, the date of the execution of the mortgage of respondent Sanford Fork & Tool Co. to respondent Buena V. Marshall, trustee, for the use and benefit of respondents as indorsers for said Sanford Fork & Tool Co. as hereinafter stated and set forth, and that no part of the indebtedness now held and claimed against respondent Sanford Fork & Tool Company by the said complainants, Howe, Brown & Co., Limited, Cortland Top & Rail Company, Limited, and Theodore Stevenson, was incurred or accrued subsequent to the execution by said Sanford Fork & Tool Company of said indemnity mortgage to Buena V. Marshall, trustee, and that neither of said three complainants extended any credit whatever to said respondent, Sanford Fork & Tool Company, after the execution of said indemnity mortgage.

63 6. Respondents admit that on and prior to March 17, 1890, respondents William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, and Willard Kidder, and one Robert Nixon

were stockholders in said respondent corporation, The Sanford Fork & Tool Company, and that on and prior to said March 17, 1890, respondents McKeen, Hulman, Minshall, and Kidder, together with one Robert Nixon, constituted the board of directors of said respondent corporation, The Sanford Fork & Tool Company.

7. That said respondent corporation, Sanford Fork & Tool Company, in addition to the means derived by it from its capital stock and from its bonded indebtedness, which bonded indebtedness is hereinafter mentioned and described, needed and required to have large sums of money from the fact that it required a very large capital to enable said respondent corporation to keep a sufficient stock of material on hand to successfully run and operate its manufacturing establishment; that said respondent corporation was therefore under the necessity of from time to time borrowing money; that, it then being a comparatively new enterprise and without a well-established market for its products, it was obliged to procure endorsers upon its paper for the purpose of procuring the necessary capital with which to vigorously and successfully prosecute its corporate business; that certain of its stockholders and officers, having full faith and confidence in the ability of said respondent corporation, Sanford Fork & Tool Company, to build up a successful and profitable manufacturing business if it could
64 procure the necessary funds, at the request of the managers of said respondent corporation indorsed its notes for large amounts of money, at the several dates and in the several amounts hereinafter named, to wit:

One note to the Terre Haute savings bank for $5,000, dated September 18, 1889, due five months from date, indorsed by respondents William R. McKeen, H. Hulman, Willard Kidder, and one Robert Nixon, a stockholder and officer of said respondent corporation.

One note to the Terre Haute savings bank, dated September 18, 1889, due six months after date, for $5,000, and endorsed by the parties last above named.

One note executed to R. Nixon, a stockholder and officer of said respondent corporation, dated December 14, 1889, due March 15, 1890, for $15,000, endorsed by the said R. Nixon and by respondents H. Hulman and Willard Kidder, said note being held by the Vigo County National bank.

One note to said R. Nixon, dated January 21, 1890, due 60 days after date, for $5,000, endorsed by the said Nixon and by respondents McKeen, Hulman, and Kidder, said note being held by the Terre Haute savings bank.

One note to respondent D. W. Minshall, dated January 21, 1890, due thirty days after date, for $4,000, endorsed by respondents Minshall, Hulman, McKeen, and Kidder, said note being held by the First National Bank of Brazil.

One note dated January 30th, 1890, to the said R. Nixon, due ninety days after date, for $15,000, and endorsed by said Nixon and by respondents Kidder, McKeen, Mayer, and Hulman, said
65 note being held by the Vigo County National bank.

One note dated February 5, 1890, to the said R. Nixon, due sixty days after date, for $5,000, and endorsed by said Nixon and by respondents Minshall, McKeen, Hulman, and Kidder, said note being held by the Vigo County National bank.

One note dated February 2, 1890, to said R. Nixon, due thirty days after date, for $5,000, indorsed by the said Nixon and by respondents Minshall, McKeen, Hulman, and Kidder, said note being held by the Vigo County National bank.

One note dated March 3, 1890, to the said R. Nixon, due sixty days after date, for $5,000, endorsed by the said Nixon and by respondents Kidder, Hulman, Minshall, and McKeen, said note being held by the Terre Haute savings bank.

One note dated March 3, 1890, to the Terre Haute savings bank, due sixty days after date, for $5,000, and endorsed by the said Robert Nixon and by respondents Kidder, Hulman, Minshall, and McKeen.

Said ten notes aggregating the sum and amount of..... $69,000

Respondents aver that all of the money procured by means of said notes was expended upon and went directly into the property and material of said respondent corporation, Sanford Fork & Tool Company.

That at the time said respondents became endorsers for and lent their credit to said respondent corporation, Sanford Fork and Tool Company, said corporation was a "going concern," in full op-
66 eration, with property and means, as respondents believed, amply sufficient to pay all of its indebtedness if its property was worth what it had cost in cash; that at that time respondents, as stockholders and directors of said corporation, believed it to be solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products; that prior to the time at which said notes so endorsed, as hereinabove stated, began to mature respondents were informed by the managers of said respondent corporation, Sanford Fork & Tool Company, that it would be unable to pay said notes at maturity and would need to have said notes as they matured renewed or the time of payment thereof extended; that thereupon, on March 1, 1890, the directors of said respondent corporation, Sanford Fork & Tool Company, called a special meeting of the stockholders of said corporation to be held on March 15, 1890, a copy of which action of said directors, marked Exhibit "A," is attached hereto and hereby made part of this answer.

That the only capital stock of said respondent corporation, Sanford Fork & Tool Company, was $100,000.00, divided into 2,000 shares of $50 each; that afterwards said capital stock was increased to $150,000.00, divided into 3,000 shares of $50 each.

That on March 15, 1890, the stockholders of said respondent corporation, Sanford Fork & Tool Company, held a meeting pursuant to said call of said directors, at which meeting 2,250 shares,
67 being a very large majority of all the capital stock of said corporation, were represented; that said stockholders at said

meeting passed a resolution authorizing the directors of said corporation to execute a mortgage or mortgages upon all or any part of the property of the corporation, real or personal, or both, to secure any new indebtedness or liability that might be thereafter incurred, or the renewal and extension of any present indebtedness or liability of the corporation, or any indebtedness thereof that might exist at the time such mortgage or mortgages might be executed. A copy of the proceedings of said stockholders' meeting, marked Exhibit "B," is attached hereto and hereby made part of this answer.

That on said March 15, 1890, the board of directors, after said stockholders' meeting, met and, pursuant to the authority given by said stockholders' meeting, adopted a resolution authorizing and directing the president and secretary of said respondent corporation to execute and deliver to Buena V. Marshall, as trustee, a mortgage to indemnify and save harmless the said endorsers or either of them from any and all payments made or liability assumed by them or either of them in behalf of said corporation, a copy of the proceedings of which said meeting of the board of directors of said respondent corporation, marked Exhibit "C," is attached hereto and hereby made part of this answer.

That prior to and at the time of said stockholders' meeting and said directors' meeting of March 15, 1890, it was understood by the stockholders and the directors of said respondent corpora-
68 tion that the endorsers of said notes hereinabove mentioned proposed and agreed that they would procure forbearance or extension of time in the collection of said notes, or would procure renewals thereof if said corporation would indemnify them by mortgage against any loss or damage they might sustain by reason of said endorsements, or by reason of any renewal or renewals of said notes, or by reason of any other payment or payments that they or either of them might make on account of the indebtedness of said corporation then existing or thereafter contracted.

Taht, pursuant to said authority so given by the stockholders and directors of said respondent corporation, the president and secretary of said respondent corporation did make, execute, and deliver to Buena V. Marshall, trustee, an indemnity mortgage to indemnify and hold harmless respondents McKeen, Hulman, Kidder, Mayer, and Minshall and one Robert Nixon against any loss by reason of their said endorsements hereinabove mentioned, that said mortgage also securing as an indemnity the repayment by said respondent corporation, Sanford Fork & Tool Company, of any sum or sums of money that might thereafter be advanced to said corporation or paid out by said endorsers or either of them upon the indebtedness of said corporation then existing or which might thereafter be contracted, a copy of which indemnity mortgage, marked Exhibit "D," is hereto attached and hereby made a part of this answer, said mortgage bearing date of March 17, 1890, and being executed and acknowledged March 21, 1890, and duly recorded on May 1, 1890.

69 That at the time of the execution and delivery of said mortgage said respondent, Sanford Fork & Tool Company, was in full operation as a "going concern," with property and means sufficient to pay its indebtedness if the cash cost of said property and materials could be obtained therefor; and continued to be such a concern and carried on its business in the usual way and met all its obligations other than the notes embraced in said indemnity mortgage as they matured in the usual course of business until the application for and appointment of the receiver hereinafter referred to.

That said respondents then believed that it was only necessary to tide said corporation over a temporary embarrassment until it could succeed in establishing a favorable footing in the market for the sale of its manufactured products.

That said respondents accepted and received said indemnity mortgage so executed and delivered in their behalf in the utmost good faith and with full and complete knowledge that every dollar of the money obtained by means of the notes upon which said respondents had become liable as endorsers had been properly appropriated to and had gone into the property and material of the said respondent corporation.

8. Respondents further aver that, relying upon said mortgage, they did propose the renewal of the said two notes of September 18, 1889, for $5,000 each, hereinabove mentioned, said renewals being endorsed by respondents Kidder, Hulman, McKeen, Mayer, and Minshall and also by one H. S. Deming, a stockholder of said respondent corporation.

That they also procured the renewal of said note of December 14, 1889, for $15,000, said renewal being endorsed by respondents
70 Kidder, Hulman, and Mayer and also by Josephus Collett and Robert Nixon, stockholders of said corporation.

That they also procured the renewal of the said notes hereinabove mentioned, one dated January 30, 1890, for $5,000, and one dated January 21, 1890, for $5,000, said renewals being endorsed by respondents Kidder, Hulman, McKeen, Mayer, and Minshall and also by H. S. Deming, a stockholder of said corporation.

That, relying upon said mortgage, said respondent- Minshall, McKeen, Kidder, and Hulman paid off the note of January 22, 1890, for $4,000, hereinabove mentioned, said payment being made June 11, 1890; that they procured the renewal of the said note of February 8, 1890, hereinabove mentioned, the said renewal note being endorsed by Kidder, Minshall, Hulman, McKeen, Mayer, and also by H. S. Deming, a stockholder of said corporation.

That they procured the renewal of the note of February 22, 1890, for $5,000, hereinabove mentioned, the renewal note being endorsed by respondents Kidder, Minshall, Hulman, McKeen, and Mayer and also by H. S. Deming, a stockholder of said corporation.

That said respondents, relying upon said mortgage, paid off the two notes dated March 3, each for $5,000, hereinabove described, said payment of said two notes being made by said respondents on June 1, 1890, and June 11, 1890.

That respondents other than said corporation have, relying upon said mortgage, paid off each and every of said renewal notes; that the said Robert Nixon has not paid any *paid any* part of any
71 or either of said notes upon which he was endorser or surety as hereinabove mentioned, but that all of said notes, aggregating the full sum of $69,000, have been paid or caused to be paid by said respondents other than the said Sanford Fork & Tool Company in reliance upon said indemnity mortgage as their indemnity for such payment.

9. Respondents further aver that the said indemnity mortgage dated March 17, 1890, was and is a second mortgage upon all of the real estate and property described therein and covered thereby and was and is subject to a prior and first mortgage or deed of trust made, executed, and delivered on July 12, 1888, by the respondent corporation, Sanford Fork & Tool Company, to Demas Deming, trustee, to secure the payment of fifty bonds for $1,000 each, dated July 2, 1888, payable July 2, 1898, with interest at the rate of six per cent. per annum, payable semi-annually, on the second days of January and July of each year, interest coupons being attached to said bonds.

And respondents aver that all of the bonds secured by said prior first mortgage or deed of trust were issued and sold shortly after the date thereof, and are now outstanding for value, and are a first and prior lien upon all the property mentioned and described in the said indemnity mortgage dated March 17, 1890, executed and acknowledged March 21, 1890, and duly recorded May 1, 1890. A true copy of said first mortgage or deed of trust is hereto attached, marked Exhibit "E," and is hereby made part of this answer.

Respondents further aver that said indemnity mortgage did not cover or convey to said Buena V. Marshall, trustee, all or any-
72 thing like or near to all of the property of and belonging to said respondent corporation, Sanford Fork & Tool Company, but, on the contrary, left unconveyed by said indemnity mortgage all of the merchandise, manufactured products, materials, furniture, bills receivable, accounts receivable, and a large tract of timber land of some four hundred acres, situated in Daviess county, Indiana, of and belonging to the said corporation, and amounting in value to far more than the total sum secured by said indemnity mortgage.

That said indemnity mortgage was not recorded for about forty days after its execution and acknowledgment, said mortgage being executed and acknowledged March 21, 1890, and being duly recorded on May 1, 1890; but respondents aver that said indemnity mortgage was duly recorded within the time allowed by law for the recording of such instruments, and that the delay in recording said mortgage was not occasioned by any purpose, desire, or intention of said respondents or either of them to conceal the existence of said mortgage or to induce any person or persons or corporation to give credit to said respondent corporation in ignorance of the existence of said indemnity mortgage.

Respondents further aver that neither of said complainants did give or extend to said corporation any additional credit, or sell to

said respondent corporation any goods or merchandise whatever after the execution and delivery of said indemnity mortgage.

Respondents further aver that on or about May 7, 1890, a suit was instituted in the Vigo circuit court of Vigo county, Indiana,
73 wherein The National State Bank of Terre Haute was plaintiff and the said respondent corporation, Sanford Fork & Tool Company, and others were defendants, said suit being founded upon certain promissory notes due from said respondent corporation to said plaintiff; that such proceedings were had in said suit that on or about May 13, 1890, John W. Davis was appointed by the Vigo circuit court a receiver to take charge of all the assets of said respondent corporation, Sanford Fork & Tool Company; that said receiver duly accepted his trust and filed the necessary bond, and took charge and possession of all the assets and property of and belonging to said respondent corporation, Sanford Fork & Tool Company.

That thereafter, pursuant to the orders and directions of the Vigo circuit court, the said receiver made out and filed an inventory and appraisement of all of the property of and belonging to said respondent corporation.

That, pursuant to the orders and directions of the Vigo circuit court, the said receiver caused such property so taken possession of by him as such receiver to be duly and legally appraised by John O'Neil and William Riley, good and competent appraisers.

That said appraisers appraised the merchandise, manufactured articles, and materials on hand of and belonging to said respondent corporation at the sum of..... $67,336 23
Bills receivable belonging to said corporation..... 588 64
Accounts " " " " 14,617 13
Office furniture " " " " 1,078 85
Timber land in Daviess county, Indiana, owned by said respondent corporation..... 4,770 00

Making in the aggregate property to the appraised
74 value of..... $88,390 85

not covered or conveyed by said indemnity mortgage.

That said appraisers appraised the value of the real estate, buildings, machinery, and fixtures covered and conveyed by said indemnity mortgage at a total valuation of $116,055.39.

Respondents aver that all of the property covered and conveyed by said indemnity mortgage was and is subject to the first and prior mortgage or deed of trust securing the payment of $50,000, together with accrued interest thereon, the description in said two mortgages being precisely the same.

Respondents therefore aver and show the court that the property covered by the said indemnity mortgage and also by said first mortgage, at the appraisement thereof made by the receiver, was and is insufficient to pay and satisfy the principal sum secured by said first mortgage and the amount of $75,000 in addition thereto paid out by said respondents as endorsers relying upon said indemnity mortgage.

And respondents further aver and show the court that in taking said indemnity mortgage they acted in the utmost good faith with and towards all other creditors of said respondent corporation, Sanford Fork & Tool Company; that they left uncovered and unconveyed by their indemnity mortgage a far greater proportion to the remaining unsecured indebtedness of said corporation than they took in taking said indemnity mortgage, and that all of the indemnity and security they did take was and is subject to the first and paramount lien of said first mortgage and deed of trust securing the payment of
75 $50,000 and accrued interest thereon, which said first mortgage or deed of trust said respondents were and are obliged to protect and pay in order to avail themselves of any security whatever under said indemnity mortgage.

Respondents further aver that they are informed and believe, and upon information and belief aver the fact to be, that the custom and usage of respondent corporation, Sanford Fork & Tool Company, and complainants Cortland Top & Rail Company and Theodore Stevenson to exchange accommodation paper, as hereinabove stated, grew out of the fact that citizens and residents of the city of Cortland, New York, who were pecuniarily interested in the complainant corporation, Cortland Top & Rail Company, were largely instrumental in the creation and incorporation of respondent corporation, Sanford Fork & Tool Company, more than one-half of the original $100,000 of capital stock of said respondent corporation having been subscribed by E. O. Rickard and A. H. Day, citizens and residents of Cortland, New York, both of whom were members of the first board of directors of said respondent corporation, Sanford Fork & Tool Company.

Respondents aver that their entire action in the premises was and has been in the utmost good faith upon their part and without any fraud, collusion, concealment, conspiracy, or any purpose, desire, or intention to wrongfully deceive or defraud any creditor of said respondent corporation, Sanford Fork & Tool Company; that they lent their credit to and advanced and paid out their money for the benefit of said respondent corporation in perfect good faith and with
76 the sole purpose and intention of enabling said respondent corporation, Sanford Fork & Tool Company, to establish and successfully and properly operate a profitable manufacturing industry; that at the time they became liable for the large sums of money hereinabove mentioned and stated and at the time said indemnity mortgage was executed and delivered they fully believed that said respondent corporation, Sanford Fork & Tool Company, would, with respondents' help in renewing and carrying for said respondent corporation some $75,000 of its indebtedness, be enabled to continue in full operation, and that it would ultimately be able to control a valuable and profitable trade and work its way out from under its entire indebtedness, and that *that* they then fully believed that said respondent corporation had property and assets amply sufficient at the cost price thereof to equal and exceed all of its indebtedness.

Respondents further aver and show the court that no acts whatever of actual fraud, wrong-doing, or misrepresentation are charged or averred against them or either of them by complainants in their said bill of complaint herein; that the sole and only charge or averment made by complainants in support of the prayer of their said bill of complaint that the court might decree said indemnity mortgage void and cancel the same is that respondents McKeen, Hulman, Minshall, Mayer, and Kidder were stockholders in and that respondents McKeen, Minshall, and Kidder were directors of said respondent corporation, Sanford Fork & Tool Company, at the time they became liable as endorsers for said respondent corporation and at the time the said indemnity mortgage was executed and delivered by said respondent corporation, Sanford Fork & Tool Company, to the said Marshall, trustee, for the benefit and protection of said respondents as such endorsers.

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Respondents aver that the fact that they were stockholders in and directors of said respondent corporation, Sanford Fork & Tool Company, at the time they became liable as endorsers for said respondent corporation and at the time said indemnity mortgage was executed and delivered did not, either at law or in equity, estop or prevent them from lending their credit or their money to said respondent corporation and taking from said respondent corporation such indemnity and security as any other person, persons, or strangers might lawfully have taken to secure themselves against loss by reason of credit lent or money advanced to said respondent corporation.

Wherefore and by reason of the facts in this answer set forth respondents aver that said indemnity mortgage executed and delivered by said respondent corporation, Sanford Fork & Tool Company, to respondent Buena V. Marshall, trustee, was and is a legal, valid, and binding mortgage, and was and is a legal and valid security for the benefit of respondents McKeen, Hulman, Minshall, Mayer, and Kidder to secure them so far as the property conveyed by said indemnity mortgage, subject to the prior lien of said first mortgage thereon will secure them against loss by reason of their said endorsements and their said payment of over $75,000 upon and by reason of their said endorsements, as hereinabove stated.

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And now, having fully answered said bill of complaint herein, respondents submit that complainants are entitled to no other or further answer from them or either of them, and pray to be hence dismissed with their reasonable costs and charges; and respondents will ever pray.

McDONALD, BUTLER & SNOW AND
GEORGE A. KNIGHT,
Solicitors for Respondents.

And of this complainants pray the judgment of the court.

(For exhibits filed with answer and made part of this paragraph of complainants' exceptions to answer, see pages 28 to 42, inclusive.)

79 STATE OF INDIANA, } ss:
Vigo County, }

Before me, Isaac H. C. Royce, a notary public in and for said county and State, personally appeared Wm. R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, and Willard Kidder, and each, separately and severally being first duly sworn, upon oath says that he has carefully read over the above and foregoing answer, and that the same is true so far as averred upon knowledge of the respondents, and that so far as the same is averred to be upon information and belief he believes the same to be true.

(Signed) WM. R. McKEEN.
" H. HULMAN.
" D. W. MINSHALL.
" ANTON MAYER.
" WILLARD KIDDER.

Subscribed and sworn to before me, Isaac H. C. Royce, a notary public, this 18th day of December, 1890.

Witness my hand and notarial seal.

(Signed) ISAAC H. C. ROYCE, [SEAL.]
Notary Public.

3rd. And said complainants further except to the said
80 answer of said respondents for that the said respondents have not to the best of their remembrance, information, and belief answered and denied nor avoided the allegations of complainants' bill of complaint, wherein complainants specifically charge that at the time of executing the said mortgage to said Buena V. Marshall, as trust*t*., &c., the said Sanford Fork & Tool Company was insolvent and was then known by said directors to be insolvent.

4th. And said complainants further except to the answer of said respondents for that *that* the said respondents have set forth in averments numbered 5 the alleged facts that the indebtedness of said Sanford Fork & Tool Company to complainants and each of them accrued prior to the 17th day of March, 1890, the date of the execution of said mortgage to said Marshall, and that none of said indebtedness accrued after said date—

Whereas the said alleged facts are immaterial—are supported by no equity—and if true do not, either in law or equity, constitute a defense to complainants' suit.

5th. And said complainants further except to the said answer of said respondents for that the respondents have not, in manner aforesaid, either in averments numbered respectively and seperately
81 6, 7, 8 stated any facts that in law or equity answer the matters and things set forth in complainants' bill of complaint; that said averments numbered 7 sets forth that the Sanford Fork & Tool Company, additional to its stock of one hundred thousand dollars*s*, needed and required to have large capital to carry on its business and extend its operations, and to that end the said McKeen, Kidder, Mayer, Hulman, Minshall, and Nixon en-

dorsed the paper of said company to the amount of $69,000, as set forth in said averment No. 7, beginning Sep. 18, 1889, and ending March 3, 1890; that said tool company was a "going concern" at the time said mortgage was executed; that the stockholders authorized the execution of said mortgage, and that pursuant thereto the directors executed said mortgage; that they were both stockholders and directors; that the- did all these things, including said endorsements of said ten notes, in good faith, honestly believing that the "concern" was solvent and was a going concern; that if the cost of the said tool company's property could be realized the company would have had sufficient means to pay its indebtedness, whereas, as matters of law and equity, said directors were charged with knowledge of the financial condition of said concern, whether it was a "going concern" or not, and were charg-able with notice as managers that the said concern was insolvent, and the averments that they endorsed said paper and consented to renew their indorsements and took said mortgage in "the utmost good faith," and that the said concern was a "going concern" and doing business in the usual way are wholly insufficient, taken with other facts alleged in said answer, to constitute a defense, for the said exhibits mentioned in averments No. 7 show insolvency and
82 knowledge thereof by said directors.

That averments numbered 8 are wholly insufficient in this, to wit, that said directors had no right in law or equity to rely on said mortgage or to procure a renewal of said notes in reliance on said mortgage, and are insufficient because they do not allege that said respondents took said mortgage at the time they became liable as endorsers in the first instance and simultaneously therewith, but, on the contrary, respondents admit that said mortgage of indemnity was taken long after their liability had been incurred, and that the debt was an antecedent debt, and that said mortgage was so executed to respondents wholly and only to secure an antecedent debt of respondents against their company, respondents, the said Sanford Fork & Tool Company.

That averments numbered 9 are insufficient, considered in connection with all other averments in said answer, because the respondents rely on the simple matter of good faith in their action and in the alleged fact that the- had a right in law and equity to deal with the corporation of whic- they were directors, whereas the said matters alleged in said number 9 are wholly insufficient in law and equity to constitute a valid defense to complainants' suit and *is* in nowise a conclusion of law. Complainants charge that the acts of respondents were both unlawful and inequitable in this, to wit, that at the time said mortgage was so executed to respondents said concern, The Sanford Fork & Tool Company, was insolvent, and that the debt thereby secure- was a pre-existing one and antecedent
83 to the date of said mortgage, and that respondents were stockholders and directors of said concern and as such directors were trustees of the creditors of said concern and had no power in law or equity to so secure and prefer themselves to the exclusion of creditors, &c., and respondents cannot justify an unlawful act nor

an act against equity on the ground that it was performed in the utmost good faith.

And this complainant excepts to the whole answer, because it contains no denial of complainants' charge that the respondent corporation was insolvent when said mortgage was executed, March 17th, 1890; and of these matters they pray judgment of the court.

McNUTT & McNUTT,
Solicitors for Complainants.

84 (EXHIBIT "A.")

TERRE HAUTE, IND., *M'ch* 1, 1890.

At a meeting of the directors of the Sanford Fork & Tool Company, held on the foregoing date, it was resolved that the president and secretary of this company be, and they are hereby, directed to call a special meeting of the stockholders of this company, to be held at the office of the company, near the city of Terre Haute, in Vigo county, Indiana, at ten o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing the execution of a mortgage or mortgages covering the property of the company and for such other business as may come before the meeting.

In accordance with foregoing resolution the following notice of meeting was either delivered by hand or mailed by registered letter to each of the stockholders, duly signed by the president and secretary, and stamped with the seal of the company:

"Pursuant to a resolution of the board of directors of this company, adopted the first day of March, A. D. 1890, you are hereby notified that there will be a special meeting of the stockholders of this company, held at the office of the company, near the city of Terre Haute, Vigo county, Indiana, at ten o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing the execution of a mortgage or mortgages covering the property of the company and for such other business as may come before the meeting."

WILLARD KIDDER, *Pres.*

ROBERT NIXON, *Sec'y.*

85 (EXHIBIT "B.")

The stockholders of the Sanford Fork & Tool Company met at the office of the company, near the city of Terre Haute, Indiana, at 10 o'clock a. m., this day, pursuant to the following notice, to wit:

"Pursuant to a resolution of the board of directors of the company, adopted the first day of March, A. D. 1890, you are hereby notified that there will be a special meeting of the stockholders of this company, held at the office of the company, near the city of Terre Haute, Vigo county, Indiana, at 10 o'clock a. m., Saturday, the fifteenth day of March, A. D. 1890, for the purpose of authorizing

the execution of a mortgage covering the property of the company and for such other business as may come before the meeting."

On motion, Mr. Willard Kidder was called to the chair and Robert Nixon was chosen sec'y, and on motion the meeting adjourned to meet at the office of W. R. McKeen, in Terre Haute, Ind., at eleven a. m. this day.

The meeting of stockholders convened, pursuant to adjournment, at the office of W. R. McKeen, at eleven o'clock a. m., M'ch 15th, 1890.

The proceedings of last meeting of stockholders was read and approved. Twenty-two hundred and fifty shares were represented at the meeting, either by the holders thereof in person or by good and sufficient proxies.

On motion of D. W. Minshall, seconded by Wm. R. McKeen, the following resolutions were unanimously adopted:

"Resolved, That the board of directors of this company be, and they are hereby, authorized to cause to be executed a mort-
86 gage or mortgages upon all or any part of the property of this company, real or personal, or both, to secure any new indebtedness or liability of this company or any indebtedness thereof that may exist at the time such mortgage or mortgages may be executed.

"And the board of directors of this company are hereby further empowered and authorized, in their discretion, to sell, convey, or dispose of the property and assets of this company of every kind and description, or from time to time any part thereof, in such manner and upon such terms as the said directors may deem best for the interests of this company."

WILLARD KIDDER, *Pres.*

ROBERT NIXON, *Sec'y.*

87 (EXHIBIT "C.")

TERRE HAUTE, IND., *M'ch* 15th, 1890.

The board of directors of the Sanford Fork & Tool Company met at the office of Wm. R. McKeen, in Terre Haute, Ind. A full board was present, with Pres't Willard Kidder in the chair and Sec'y Rob't Nixon acting as such. The minutes of the last meeting were read and approved.

On motion of Mr. Hulman, seconded by Mr. McKeen, the following resolution was unanimously adopted:

Whereas the company has now outstanding against it certain notes which are wholly unpaid, and certain parties are liable thereon as indorsers, but in fact as sureties for said company, the said notes and indorsements being described as follows, to wit:

One note to the Terre Haute savings bank for five thousand, ($5,000) dollars, dated Sept. 18, 1889, due in five months from date, indorsed by Robert Nixon, Wm. R. McKeen, H. Hulman, and Willard Kidder.

One note to the Terre Haute savings bank, dated Sept. 18, 1889, due in six months from date, for five thousand ($5,000) dollars, and endorsed by the parties last above named.

One note to Robert Nixon, dated December 14th, 1889 (due on or before after date), for fifteen thousand ($15,000.00) dollars, endorsed by R. Nixon, H. Hulman, and Willard Kidder, and held by the Vigo County National bank.

One note to Robert Nixon, dated January 21st, 1890, due thirty days after date, for four thousand ($4,000.00) dollars, endorsed by D. W. Minshall, H. Hulman, Wm. R. McKeen, and Willard
88 Kidder, and held by the First National Bank of Brazil, Indiana.

One note dated January 30th, 1890, to Robert Nixon, due in ninety days after date, for fifteen thousand (15,000.00) dollars, endorsed by R. Nixon, Willard Kidder, Wm. R. McKeen, Anton Mayer, and H. Hulman, and held by the Vigo County National bank.

One note dated March 3d, 1890, to Robert Nixon, due sixty days after date, for five thousand ($5,000) dollars, endorsed by Robert Nixon, Willard Kidder, H. Hulman, D. W. Minshall, and Wm. R. McKeen, and held by the Terre Haute savings bank.

One note dated March 3d, 1890, to the Terre Haute savings bank, due sixty days after date, for five thousand (5,000) dollars, and endorsed by the parties last above named.

One note dated February 22nd, 1890, to Robert Nixon, due thirty days after date, for $5,000, endorsed by Robert Nixon, D. W. Minshall, Wm. R. McKeen, H. Hulman, and Willard Kidder, and held by the Vigo County National bank.

One note dated February 5th, 1890, to R. Nixon, due in sixty days after date, for five thousand ($5,000) dollars, endorsed by the parties last above named, and held by the Vigo County National bank; and

Whereas this company is indebted in various other amounts to sundry persons and has been and will be unable to pay said notes as they mature and pay its other indebtedness as aforesaid, and it has been proposed by the said endorsers of said notes to pro-
89 cure forbearance in the collection of said notes or to procure renewals thereof if said company would indemnify them by a mortgage upon the property of said company against any loss or damage they might sustain by reason of said endorsements or either of them or by reason of any renewal of renewals of said notes or by reason of any other payment or payments the said endorsers or either of them may make on account of the indebtedness of said company, now existing or hereafter contracted; and

Whereas this company has agreed to furnish such indemnity as stipulated for by said endorsers, and the stockholders of this company have authorized the execution of such mortgage security:

Now, therefor, resolved, That the president and secretary of this company be, and they are hereby, authorized and directed to execute under the corporate seal of this company and deliver to Buena V. Marshall, as trustee, a mortgage covering all the property

of this company and be of such effect in law as to fully indemnify and save harmless the said endorsers or either of them from any and all payments made or liabilities assumed by them or either of them in behalf of this company or on its account.

There being no further business, the board adjourned.

WILLARD KIDDER, *Pres't.*

ROBT NIXON, *Sec'y.*

90 (EXHIBIT "D.")

This indenture, made and entered into this seventeenth day of March, A. D. eighteen hundred and ninety, by and between the Sanford Fork & Tool Company, a corporation of the State of Indiana, and Buena V. Marshall, of Vigo county, in the State of Indiana, as trustee,

Witnesseth: Whereas, the said company is indebted in a large amount to sundry persons, and a portion of such indebtedness is evidenced by certain promissory notes, endorsed by sundry persons as sureties for said company, which notes are described as follows, to wit:—

One note to the Terre Haute savings bank for five thousand ($5,000) dollars, dated September 18, 1889, due in five months from date, endorsed by R. Nixon, William R. McKeen, H. Hulman and Willard Kidder.

One note to the Terre Haute savings bank, dated September 18th, 1889, due in six months from date, for five thousand ($5,000) dollars, and endorsed by the parties last above named.

One note to R. Nixon, dated December 14th, 1889, due on or before March 15th, 1890, for fifteen thousand ($15,000) dollars, endorsed by R. Nixon, H. Hulman and Willard Kidder, and held by the Vigo County National bank.

One note to R. Nixon, dated January 21st, 1890, due sixty days after date, for five thousand ($5,000) dollars, endorsed by R. Nixon, William R. McKeen, H. Hulman and Willard Kidder, and held by the Terre Haute savings bank.

One note to D. W. Minshall, dated January 21st, 1890, due thirty days after date, for four thousand ($4,000) dollars, en-
91 dorsed by D. W. Minshall, H. Hulman, William R. McKeen and Willard Kidder, and held by the First National Bank of Brazil.

One note, dated January 30th, 1890, to R. Nixon, due in ninety days after date, for fifteen thousand ($15,000) dollars, endorsed by R. Nixon, Willard Kidder, William R. McKeen, Anton Mayer and H. Hulman, and held by the Vigo County National bank.

One note dated March 3rd, 1890, to the Terre Haute savings bank, due sixty days after date, for five thousand ($5,000) dollars, and endorsed by R. Nixon, Willard Kidder, H. Hulman, D. W. Minshall and William R. McKeen.

One note dated March 3rd, 1890, to R. Nixon, due ninety days after date, for five thousand ($5,000) dollars, and endorsed by the parties last above named, and held by the Terre Haute savings bank.

One note dated February 22nd, 1890, to R. Nixon, due thirty days after date, for five thousand ($5,000) dollars, endorsed by R. Nixon, D. W. Minshall, William R. McKeen, H. Hulman and Willard Kidder, and held by the Vigo County National bank.

One note dated February 5th, 1890, to R. Nixon, due in sixty days after date, for five thousand ($5,000) dollars, endorsed by the parties last above named, and held by the said Vigo County National bank.

And whereas, the said company has been and still is unable to pay said notes as they have matured, and will not be able to pay
92 such of said notes as they may mature in the future, and the said endorsers have proposed to procure forbearance in the collection of said notes, or to procure renewals thereof, if said company will agree to indemnify and save harmless said endorsers from any and all loss or damage on account of moneys said endorsers may be required to pay on account of the renewal or renewals of any such notes, and any and all loss or damage on account of any moneys advanced from time to time by said endorsers or either of them to pay any debts of said company now existing, or that may be hereafter contracted, and

Whereas, said company, by prior action of its stockholders and directors, has agreed and does hereby agree, upon demand, to fully indemnify and save harmless said endorsers, and each and every one of them from any loss or damage on account of any or all of the items or things hereinbefore recited, and has also agreed and doth hereby agree that it will pay interest at the rate of seven per cent. per annum on all moneys advanced for it by said endorsers or either of them pursuant to the items thereof, and

Whereas, to procure the faithful performance of the covenents and agreements hereinbefore recited, it has been agreed by and between said company and said R. Nixon, William R. McKeen, H. Hulman, Willard Kidder, Anton Mayer and D. W. Minshall, endorsers as aforesaid, that said company should execute a mortgage to Buena V. Marshall, as trustee, for said endorsers, covering the property hereinbefore described:

Now, therefore, the Sanford Fork & Tool Company afore-
92½ said doth hereby mortgage and warrant unto Buena V. Marshall, trustee as aforesaid, the following real estate, situated in the county of Vigo, and State of Indiana, to wit:

Commencing at a point six hundred and eighty (680) feet east, and one thousand, three hundred and twelve (1,312) feet and six (6) inches south of a stone planted at the intersection of the east line of First street, in the city of Terre Haute, Vigo county, Indiana, and the center line of Hulman street, city of Terre Haute, Vigo county, Indiana, thence south four hundred and thirty-six (436) feet and six (6) inches, thence west three hundred (300) feet, thence north four hundred and thirty-six (436) feet and six (6) inches, thence east three hundred (300) feet to the place of beginning, containing three (3) acres, more or less, with all the buildings, offices, shops, engines and boilers, machinery, fixtures and appurtenances of said real estate.

It is hereby expressly understood and agreed that if at any time the mortgagor make default in the performance of its part of any of the covenants and agreements of this mortgage, as recited in the preamble hereto, then the said trustee, upon request of the party or parties to whom anything may be due and owing, pursuant to the terms hereof, shall forthwith proceed to foreclose this mortgage and collect the money so due from said mortgagor, and said trustee shall from time to time, upon like request and so often as it may be necessary, foreclose this mortgage and recover from said mortgagor any and all amounts for which it may be liable under the terms hereof, and the mortgagor hereby expressly agrees
93 upon demand to pay any and all such amounts, with interest as aforesaid, to said trustee, together with attorney's fees and the charges made by and allowed to said trustee for his services in this behalf, and to pay any and all such amounts without relief from valuation or appraisement laws.

In witness whereof, the said Sanford Fork & Tool Company hath caused this instrument to be executed by its president, and its corporate seal to be hereunto affixed by its secretary.

Per WILLARD KIDDER, *Pres.*

ROBERT NIXON, *Sec.* [SEAL.]

STATE OF INDIANA, }
County of Vigo, } *ss:*

Before me, the undersigned, a notary public in and for said county and State, this 21st day of March, A. D. 1890, personally appeared Willard Kidder, president, and Robert Nixon, secretary, of the Sanford Fork & Tool Company, and acknowledged that they executed the foregoing mortgage for and in behalf of said company, and as its free and voluntary deed for the uses and purposes therein set forth.

Witness my hand and notarial seal.

[SEAL.] IRVING RIDDLE,
Notary Public.

94 (EXHIBIT "E.")

This mortgage or deed of trust made this second day of July, 1888, between the Sanford Fork & Tool Company, a corporation organized and existing under the laws of the State of Indiana, party of the first part, and Demas Deming, trustee, of Terre Haute, Indiana, party of the second part—

Whereas the stockholders of said Sanford Fork & Tool Company, at a meeting held on June 19, 1888, and called by notice to each of the stockholders for the purpose of providing additional means to carry on the operations of the company, did by resolution adopted at said meeting, at which a majority of the stock was represented, empower and instruct the president and secretary of said company to borrow fifty thousand dollars for its use, and on the

credit of said party of the first part, and to issue and sell for that purpose at not less than par its negotiable bonds secured by mortgage on the property of said party of the first part situated in the county of Vigo, State of Indiana.

And whereas in pursuance of said action of said stockholders said party of the first part has made its fifty negotiable bond coupon bonds of even date herewith, and numbered consecutively from one to fifty inclusive, payable to said party of the second part, trustee, or bearer, each bond being for the sum of one thousand dollars, dated the second day of July, 1888, payable on the second day of July, 1898, with interest at the rate of 6 per cent. per annum, payable semi-annually, on the second day of January and July of each year, with interest coupons attached; and principal and interest of each bond being payable at the First National Bank of
95 Terre Haute, Indiana, without relief from valuation or appraisement laws, and—

Whereas the said party of the second part has been selected for the purpose of receiving, holding and administering a mortgage to secure the principal and interest of said bonds, and has accepted said trust, and—

Whereas it is also provided in each of said bonds that if any installments of interest thereon or on either of them, should remain unpaid for six months after due presentment thereof for payment, then, and by reason thereof, the principal of all of said bonds shall at and upon the election of a majority in interest of the bondholders of said bonds, be and become due and payable; and that this deed of trust given to secure said bonds may thereupon be foreclosed accordingly—

Now, therefore, this deed of trust witnesseth: That the said party of the first part, in consideration of the premises, and for the sum of one dollar, the receipt whereof is hereby acknowledged, does hereby grant, bargain and sell, convey, mortgage and confirm, to said party of the second part, his heirs, successors and assigns, the following-described property situate in the county of Vigo, State of Indiana, viz:—

Commencing at a point six hundred and eighty (680) feet east and one thousand three hundred and twelve (1,312) feet and six (6) inches south of a stone planted at the intersection of the east line of First street, in the city of Terre Haute, Vigo county, Indiana, and the center line of Hulman street, city of Terre Haute, Vigo county, Indiana, then south four hundred thirty-six (436) feet and
96 six inches, thence west three hundred (300) feet, thence north four hundred thirty-six (436) feet and six (6) inches, thence east three hundred (300) feet to the place of beginning, containing three acres more or less. Also the buildings, offices, shops, engines, and boilers, machinery, fixtures and appurtenances on and of said real estate, and that may be hereafter erected, constructed and acquired.

To have and to hold all of the said property to the said party of the second part, his heirs and assigns forever, in trust and for the benefit of all the holders of said bonds equally. The said party of the

first part and its successors hereby covenants with said party of the second part, his heirs and assigns, as such trustee, that it is lawfully possessed of all the aforesaid property as its own property, and as of a good and lawful possessory right, in accordance with the laws of Indiana, and that it, said party of the first part, and its successors, warrant and defend the same against all claims whatsoever, provided, nevertheless, and these presents are subject to the following conditions, viz:

If the said party of the first part shall well and truly pay or cause to be paid each and every of said bonds as it falls due, and the principal thereof when it becomes due, according to the tenor and effect of said bonds and coupons to and for the benefit of the respective holders thereof for the time being, then this indenture shall become and be void, and for no effect; otherwise it shall remain in full force and virtue in law.

It is hereby stipulated and agreed that if, at any time, here-
97 after, the party of the first part shall make default in payment of said interest to accrue on said bonds, so that at any time two of such installments of interest shall be overdue and unpaid, then and in that case, for the purpose of foreclosure of this mortgage, and the sale of said mortgaged property, the principal of all said bonds shall be deemed and taken as due and payable, and said trustee may, upon request of the holders of a majority in interest of said bonds, *shall* proceed to foreclose this mortgage. In case of death, resignation or incapacity of said party of the second part before the complete execution of his trust in the premises, it shall be competent and lawful to appoint a successor in trust, upon the written petition of a majority in interest of the holders of the bonds hereby secured and then outstanding to the circuit court of Vigo county, Indiana, designating a successor, and requesting his appointment, said court may appoint the person so designated, as such trustee. The person so appointed as trustee shall hereby, *ipso facto* be invested with all the rights, title and powers and duties that are hereby invested in the party of the second part.

In witness whereof, the Sanford Fork & Tool Company have caused these presents to be signed by its president, attested by its secretary, and the seal of the company affixed this second day of July, 1888.

[SEAL.] ROBERT NIXON, *Pres.*

Attest: A. URBAN, *Sec.*

Acknowledged before—
B. V. MARSHALL.

24 August, 1888.

98 And afterwards, to wit, at the May term of said court, on the 22nd day of May, 1891, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective solicitors, and thereupon the court, having heard the argument of counsel upon the exceptions of the complainants to the answer of the defendants herein and being sufficiently advised in the premises, doth now sustain said exceptions.

To which ruling of the court sustaining said exceptions of complainants to the answer of defendants the said defendants here and now except.

And now come the said defendants, by their solicitors, and decline to plead further and elect to stand by their said answer; and the court having considered the pleadings and being fully advised in the premises, it is now ordered, adjudged, and decreed by the court that the mortgage mentioned and described in the complainants' bill of complaint was and is invalid and void. It is further ordered, adjudged, and decreed that the said complainants are entitled to and do receive their *pro rata* share of the proceeds derived from the sale of the property and assets of the Sanford Fork and Tool Company, in application upon the several claims against said company, the same as though said mortgage in said complaint mentioned and described had never been executed and delivered by said Sanford Fork and Tool Company to said defendants named in said mortgage and made beneficiaries thereunder.

It is further ordered, adjudged, and decreed that the said defendants named in and made beneficiaries under said mortgage
99 do take nothing whatever from the assets of or from the proceeds of sale of the assets of said Sanford Fork and Tool Company by reason of or on account of the said mortgage herein decreed to be invalid and void; to which decree and every part thereof the said defendants named in and joining in the said answer to which exceptions have been sustained by the court now here except and pray an appeal to the Supreme Court of the United States, which appeal is now granted by the court upon the filing by said defendants of a supersedeas bond in the sum of $12,000, with sureties to be approved by the court, which said bond, when approved by the court, shall be and operate as a supersedeas and shall supersede and stay all proceedings under this decree pending the appeal therefrom.

And afterwards, to wit, at the May term of said court, on the 28th day of May, 1891, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by counsel, and file their appeal bond herein in the sum of twelve thousand dollars; which bond is now approved by the court and is in the words following, to wit:

100 Supreme Court of the United States.

HOWE, BROWN & COMPANY, LIMITED; CORTLAND TOP and Rail Company, Limited, and Theodore Stevenson

vs.

SANFORD FORK & TOOL COMPANY, BUENA V. MARshall, Trustee; William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, Willard Kidder, & John W. Davis, Receiver of the Sanford Fork & Tool Company. } No. 8612.

Know all men by these presents that we, The Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Deloss W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork and Tool Company, and Josephus W. Collett, are held and firmly bound unto the above-named Howe, Brown & Company, Limited; Cortland Top and Rail Company, Limited, and Theodore Stevenson in the sum of twelve thousand dollars, to be paid to said Howe, Brown & Company, &c.; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators jointly by these presents.

Sealed with our seals and dated this 25th day of May, 1891.

101 Whereas the above-named The Sanford Fork & Tool Company and others hath prosecuted their appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named The Sanford Fork & Tool Co. & others shall prosecute their said appeal to effect and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make good their plea, then this obligation to be void; otherwise in full force.

SANFORD FORK & TOOL CO.,
P'r WILLARD KIDDER, *Pres.* [SEAL.]
WILLIAM R. McKEEN. [SEAL.]
HERMAN HULMAN. [SEAL.]
DELOSS W. MINSHALL. [SEAL.]
ANTON MAYER. [SEAL.]
WILLARD KIDDER. [SEAL.]
JOSEPHUS COLLETT. [SEAL.]
BUENA V. MARSHALL,
Trustee. [SEAL.]
JOHN W. DAVIS, [SEAL.]
Receiver Sanford Fork & Tool Co.

Sealed and delivered in presence of—

—— ——.

Taken and approved by me this 28th day of May, 1891.

W. A. WOODS.

102 In the Supreme Court of the United States.

SANFORD FORK & TOOL COMPANY, BUENA V. MARSHALL, Trustee; William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, Receiver, Appellants,

vs.

HOWE, BROWN & COMPANY, LIMITED; CORTLAND TOP & RAIL COMPANY, LIMITED, and THEODORE STEVENSON, Appellees.

Appeal from the circuit court of the United States for the district of Indiana.

Come now the Sanford Fork & Tool Company, Buena V. Marshall, trustee; William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer, Willard Kidder, and John W. Davis, receiver of the Sanford Fork & Tool Company, appellants, and for their assignment of errors say:

Assignment of Errors.

1. The circuit court erred in sustaining the exceptions of the complainants to the answer of the defendants—appellees herein.

2. The circuit court erred in adjudging and decreeing that the mortgage mentioned and described in the complainants' bill of complaint was and is invalid and void.

3. The circuit court erred in adjudging and decreeing that the complainants—appellees herein—are entitled to and do receive a full *pro rata* share of the proceeds of sale of the property and assets of the Sanford Fork & Tool Company as though said mortgage by said Sanford Fork & Tool Company to said other defendants—appellants herein—mentioned and described in complainants' bill of complaint had never been executed and delivered to said defendants—appellants herein—mentioned in said mortgage; and said circuit court further erred in adjudging and decreeing

103 that said defendants—appellants herein—named in and made beneficiaries in said mortgage do take nothing whatever from the assets or from the proceeds of sale of said Sanford Fork & Tool Company by reason of or on account of said mortgage executed by said Sanford Fork & Tool Company to said other defendants—appellants herein.

JOHN M. BUTLER,
Solicitor for Appellants.

104 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in

the cause of Howe, Brown & Company, Limited, *et al. vs.* Sanford Fork & Tool Company *et al.* as fully as the same appears of record and remains on file in my office.

Seal Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 28th day of May, A. D. 1891.

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Case No. 14,670. Indiana C. C. U. S. No. 503. The Sanford Fork & Tool Company *et al.*, appellants, *vs.* Howe, Brown & Company (Limited), Cortland Top and Rail Company (Limited), & Theodore Stevenson. Filed June 3, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

THE SANFORD FORK & TOOL CO. *et al.*, Appellants,
v.
HOWE, BROWN & CO. (LIMITED) *et al.* } No. 190.

In the Circuit Court of the United States for the District of Indiana.

HOWE, BROWN & CO. *et al.*
vs.
SANFORD FORK AND TOOL CO. *et al.* } 8612. In Equity. On Demurrer to Bill.

The bill shows that the respondents, McKean, Nixon, Minshall, Kidder, and Mayer, are stockholders, and all except Mayer directors, of the Sanford Fork and Tool Company, incorporated, and that, being liable as indorsers of the paper of that company, overdue and about to become due, to the aggregate amount of $69,000.00, Mayer being liable jointly with the others or some of them upon a part of that paper, the said directors, on the 17th day of March, 1890, after first procuring the consent and authority of the stockholders that it should be done, caused the officers of the company to execute a mortgage upon the corporate "buildings, machinery, and plant" to indemnify them and Mayer from loss on account of that liability; that the company was at the time deeply insolvent, its debts exceeding its assets by as much as one hundred and fifty thousand dollars, and that on the 13th of May it was put into the hands of a receiver by the circuit court of Vigo county.

The complainants are shown to be general creditors of the company, with claims which, as allowed by the Vigo circuit court, amount to $11,631.39, and they dispute the validity of the mortgage for the indemnity of the respondents on the ground that the directors of the company had no right to obtain a preference for themselves over other creditors. It is not alleged, nor was it claimed in argument, that the respondents or any of them did anything with an actual intent to defraud.

The question whether or not an insolvent corporation which had not suspended business could prefer its directors or managing agents who were its creditors or liable as indorsers of its paper was considered, upon full argument and citation of authorities *pro* and *con.*, in the case of Lippincott *et al. vs.* Shaw Carriage Company, 25 Fed. Rep., 577, 586, and the conclusion was reached that the weight of authority and reason was against the validity of such preferences. The theory upon which that conclusion was based is shown in the following extract from the opinion:

"For while it is generally conceded that a corporation, notwithstanding insolvency, continues possessed" (while a going concern)

"of a general power of management of its affairs, and like natural persons may give preferences by way of payment or security to one creditor or class of creditors over others, yet, in close analogy to the rule which forbids the giving of preferences by individual debtors for the purpose of securing or in such manner as to secure advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion, as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents or any of them will be set aside. Indeed, it has been often said by judges, including those of the Federal Supreme Court, that the property of an insolvent corporation is a trust fund and the directors trustees for the creditors, and if this were strictly so, it is manifest that no preferences could be allowed between creditors standing in the same relation to the fund. These statements are, however, true in a qualified sense, and lead logically, if not necessarily, to the conclusion that in such cases if they give preferences they must do it unbiased by considerations of personal advantage or gain."

That ruling has the support of a number of later decisions, in some of which it is expressly approved.

White, Potter & Paige M'f'g Co. *vs.* Pettis Importing Co., 30 Fed. Rep., 864.
Adam *vs.* Kehalen Milling Co., 35 *id.*, 433.
Beach *vs.* Miller (Ill. S. C.), 22 N. E. Rep., 464.
Haywood *vs.* Lumber Co., 64 Wis., 639 (26 N. E. Rep., 184).
Olney *vs.* Conanicut Land Co. (R. I.), 56 R. I., 361.
Rowe *vs.* Merchants' Nat. B'k (Ohio S. C.), 22 N. E. Rep., 293.
See also Hope *vs.* Valley City Salt Co., 25 W. Va., 789; Gellet *vs.* Moody, 3 N. Y., 479.

On the contrary, the supreme court of Iowa, in the recent case of Garrett *vs.* Burlington Plow Co., 70 Iowa, 697, has declared such preferences valid if fairly given, and in support of that view counsel for the respondents have referred to the following cases not cited in Lippincott *vs.* Shaw Carriage Company, *supra*:

Stratton *vs.* Allen, 16 N. J. Eq., 229.
Willemison *vs.* Banerle, 41 *id.*, 635.
Flint, &c., R. R. Co. *vs.* Dewey, 14 Mich., 477.

It is not to be overlooked that some of the later decisions which deny the validity of preferences in favor of directors proceed upon the theory that the directors of an insolvent corporation, even before a suspension of business, are trustees for the creditors, and if that theory is essential to the conclusion the question is perhaps already foreclosed in the Federal courts, because in Smith Milling Purifier Co. *vs.* McGroarty, 136 U. S., 241, the Supreme Court has said that the decision in Rouse *vs.* Merchants' National Bank, *supra*, "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more gen-

eral sense than could be maintained upon general principles of equity jurisprudence." But I do not think that theory indispensable. It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges.

The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests, I think, will compel its recognition and adoption.

The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefitted, they themselves being stockholders, and even if this were not averred the case would not, I think, be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth, and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization for the purpose not only of escaping the ordinary risks of business done in the owner's name (which may be legitimate enough), but of enabling the promoters and managers when failure comes to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence.

The demurrer is overruled.

[Endorsed:] Howe, Brown & Co. *vs.* Sanford Fork & Tool Co. Copy of Judge Woods' opinion. 44 Fed. Rep., 231.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE SANFORD FORK AND TOOL COMPANY, WILLIAM R. McKEEN, AND OTHERS,
Appellants,

vs.

HOWE, BROWN AND COMPANY, LIMITED, CORTLAND TOP AND RAIL COMPANY, LIMITED, AND THEODORE STEVENSON,
Appellees.

No. 190.

October Term, 1894.

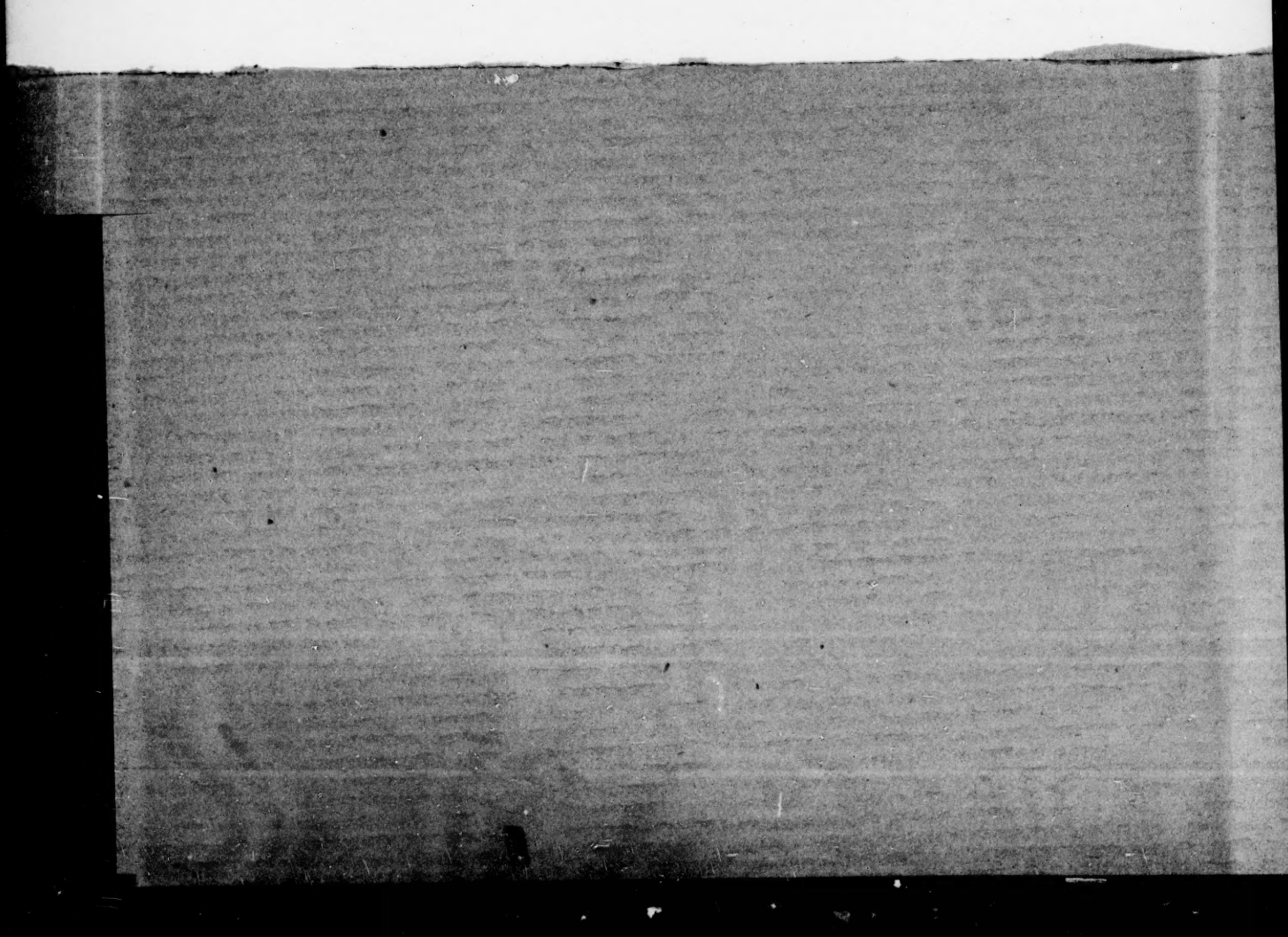
APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF APPELLANTS.

By JOHN M. BUTLER,
Solicitor for Appellants.

GEORGE A. KNIGHT,
Of Counsel.

Frank H. Smith, Printer, Indianapolis.



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BRIEF IN BEHALF OF APPELLANTS.

THE QUESTION INVOLVED.

The record in this appeal presents for consideration and decision a single question, which may be stated thus:

CAN DIRECTORS AND STOCKHOLDERS OF A MANUFACTURING CORPORATION LEND THEIR MONEY AND THEIR CREDIT TO SUCH

CORPORATION AND ACCEPT FROM IT, AS SECURITY AND INDEMNITY, A *SECOND MORTGAGE UPON A PART* OF THE CORPORATE PROPERTY OF THE CORPORATION;—THE DIRECTORS AND STOCKHOLDERS, IN LENDING THEIR MONEY AND CREDIT TO THE CORPORATION, ACTING IN PERFECT GOOD FAITH, AND,—AT THE TIME THEY LENT THEIR MONEY AND CREDIT TO THE CORPORATION AND ACCEPTED SUCH SECOND MORTGAGE FROM THE CORPORATION AS SECURITY AND INDEMNITY,—FULLY BELIEVING THE CORPORATION TO BE ENTIRELY SOLVENT AND POSSESSED OF PROPERTY AND MEANS AMPLY SUFFICIENT TO PAY ALL OF ITS LIABILITIES?

STATEMENT.

The Sanford Fork and Tool Company was incorporated in June, 1887, for the purpose of manufacturing and selling forks, hoes, shovels, rakes, picks and other implements, and tools of a similar kind.

The original capital stock was $100,000, in shares of $50 each. The capital stock was increased to $150,000.

The manufacturing plant of the corporation was constructed, and its business was carried on, at Terre Haute, Indiana. It also purchased and paid for a valuable tract of timber land in Daviess County, Indiana, as a source of supply of the timber necessary for the handles and wooden parts of the implements manufactured by it.

The manufacturing plant was completed and had been in full and continuous operation for about eighteen months next prior to May 13, 1890. Prior to said last named date the corporation had found market for a very considerable amount of its manufactured articles, and was gradually winning its way to a steady and permanent market for its output. On said date—May 13,

1890,—the corporation had on hand a large stock of manufactured implements ready for market, and a large amount of material in process of being manufactured; its implements ready for sale, and its materials on hand and in process of manufacture, then aggregating the sum of $67,336.23, on an appraisement made by good and competent appraisers.

To aid in the construction of its plant, and the payment for its machinery and materials with which to begin the work of manufacturing, the corporation,—in addition to the proceeds of its capital stock,—issued and sold bonds to the amount of $50,000, the payment of which was secured by a *first mortgage* upon the real estate and machinery constituting its manufacturing plant. *This mortgage did not cover the timber land owned by the Company, neither did it cover any manufactured implements or the material on hand for manufacturing, or bills receivable, or accounts for manufactured articles sold.*

The majority of the original capital stock of the Sanford Fork and Tool Company was subscribed by citizens and residents of Cortland, New York, who were also stockholders in and pecuniarily interested in, the Cortland Top and Rail Company, one of the appellees herein, which was a corporation of New York, with its place of business at Cortland in that State. But shortly after the enterprise was inaugurated a number of leading business men of Terre Haute,—including appellants William R. McKeen, Herman Hulman, Delos W. Minshall, Anton Mayer and Willard Kidder,—became stockholders in said corporation; and on and prior to March 17, 1890, appellants McKeen, Hulman, Minshall and Kidder, together with one Robert Nixon, constituted the board of directors of said Sanford Fork and Tool Company.

From the fact that the Sanford Fork and Tool Company was a new enterprise, without an established market for its manufactured products, and obliged to win its way to a favorable footing in the market against strong competition by old and well-known firms and corporations manufacturing like implements, it found in the beginning slow sale for its manufactured articles. At the same time it required large sums of money, from the fact that it required a very large capital to keep on hand ready for sale a full assortment of the various implements manufactured by it, and also to keep on hand a sufficient stock of materials to successfully operate, and keep in operation, its manufacturing establishment. The corporation was, therefore, under the necessity, from time to time, of borrowing money upon its paper. Upon its obligation for such borrowed money it was obliged to procure indorsers.

Under the circumstances above stated, appellants McKeen, Hulman, Minshall and Kidder, being stockholders and directors, together with appellant Mayer,—a stockholder but not a director,—having full confidence in the solvency of said Sanford Fork and Tool Company, and in its ability to build up a successful and profitable manufacturing business if it could procure the necessary funds to aid it in keeping its establishment in operation until it could find a favorable market for its manufactured products, became, at the request of the managers of said corporation, indorsers for the corporation, between September, 1889, and March 3, 1890, upon ten notes of said corporation, aggregating $69,000.

All of the money procured by means of said notes was expended upon, and went directly into, the property, manu-

factured implements, and materials for manufacture, of said Sanford Fork and Tool Company.

At the time said appellants became indorsers for, and lent their credit to, said Sanford Fork and Tool Company, said corporation was a "going concern," in full operation, with property and means, as appellants fully believed, amply sufficient to pay all of its indebtedness, if its property was worth what it had recently cost in cash; said appellants then believed the property of said corporation to be worth what it had recently cost in cash; and said appellants, as stockholders and directors of said corporation, fully believed it to be solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products.

Shortly before the time at which said notes, so indorsed by appellants as herein above stated, began to mature, appellants were informed by the managers of said Sanford Fork and Tool Company that it would be unable to pay said notes at maturity, and at the same time keep the manufacturing establishment in full operation, and that it would need to have said notes as they matured renewed, or the time of payment thereof extended. Thereupon, on March 1, 1890, the directors of said corporation called a special meeting of the stockholders thereof, to be held on March 15, 1890.

On March 15, 1890, the stockholders of said Sanford Fork and Tool Company held a meeting, pursuant to said call of its board of directors, at which meeting 2,250 shares, out of a total of 3,000 shares, were represented. At said meeting the stockholders passed a resolution authorizing the board of directors of said

corporation to execute a mortgage or mortgages upon all or any part of the property of the corporation, real or personal, or both, to secure any new indebtedness or liability that might be thereafter incurred, or the renewal and extension of any present indebtedness or liability of the corporation, or any indebtedness thereof that might exist at the time such mortgage or mortgages might be executed. On said March 15, 1890, the board of directors, after said stockholders' meeting, met, and, pursuant to the authority given by said stockholders' meeting, adopted a resolution authorizing and directing the president and secretary of said corporation to execute and deliver to appellant, Buena V. Marshall, as Trustee, a mortgage to indemnify and save harmless the said indorsers herein above named, or either of them, from any and all payments made, or liability assumed by them, or either of them, in behalf of said corporation, and to secure the payment of any advances they, or either of them, might thereafter make.

At the time of said stockholders' meeting and said directors' meeting of March 15, 1890, appellants McKeen, Hulman, Minshall, Kidder, and Mayer, the indorsers on said notes herein above mentioned, agreed with said corporation that they would procure forbearance or extension of time in the collection of said notes, or would procure renewals thereof, if said corporation would indemnify them by mortgage against any loss or damage that they might sustain by reason of said indorsements, or by reason of any renewal or renewals of said notes, or by reason of any payment or payments that they, or either of them, might make on account of any indebtedness of said corporation then existing or thereafter contracted.

Pursuant to the authority so given by the stockholders and directors of the Sanford Fork and Tool Company, the president and secretary of said corporation did make, execute, and deliver to Buena V. Marshall, Trustee, an indemnity mortgage to indemnify and hold harmless said appellants against any loss by reason of said indorsements herein above mentioned, the said mortgage also securing as an indemnity, the repayment by said corporation, of any sum or sums of money that might thereafter be advanced to said corporation, or paid out by said indorsers, or either of them, upon any indebtedness of said corporation then existing or which might thereafter be contracted: Said indemnity mortgage bearing date March 17, 1890, being executed and acknowledged March 21, 1890, and being duly recorded on May 1, 1890.

At the time of the execution and delivery of said indemnity mortgage the Sanford Fork and Tool Company was in full operation as a "going concern" with property and means sufficient to pay its indebtedness in full, if the cost of the property and materials could be obtained therefor. Appellants then fully believed the property of said corporation to be worth what it had recently cost in cash, and believed said corporation to be solvent. Said corporation continued in full operation, carried on its business in the usual way, and met all its obligations,—other than the notes embraced in said indemnity mortgage,—as they matured, in the usual course of business, until May 13, 1890, the date of the appointment of appellant John W. Davis as receiver of said Sanford Fork and Tool Company. The amount paid by said corporation in the usual course of business and in paying its current operating expenses

and maturing obligations between March 21, 1890, the date of the execution and delivery of said indemnity mortgage, and May 13, 1890, the date of the appointment of appellant Davis as receiver of said corporation, was something over $30,000.

Appellants McKeen, Hulman, Minshall, Kidder and Mayer accepted and received said indemnity mortgage, so executed and delivered in their behalf, in the utmost good faith and with full and complete knowledge that every dollar of the money obtained by means of the notes upon which said appellants had become liable as indorsers, had been properly appropriated to, and had gone into, the property, manufactured implements, and material for manufacture, of said corporation: Said appellants then fully believing said corporation to be entirely solvent, and that it was only necessary to tide it over a temporary embarrassment until it could succeed in establishing a favorable footing in the market for the sale of its manufactured products.

Relying upon said indemnity mortgage, said appellants McKeen, Hulman, Minshall, Kidder and Mayer, paid off three of said ten notes upon which they, or some of them, were indorsers, at maturity thereof; said three notes so paid off aggregating $14,000: And procured the renewal of the seven remaining notes of said ten notes upon which they, or some of them, were indorsers: The aggregate amount of said seven notes so renewed being $55,000.

Upon the maturity of said renewal notes last above mentioned, said appellants McKeen, Hulman, Minshall, Kidder and Mayer, paid off said renewal notes in full, with all interest due thereon, relying upon said indemnity mortgage for repayment of the amounts so

paid by them for said corporation: Making the total amount paid out by appellants upon the ten notes upon which they, or some of them, were indorsers at the time of the execution and delivery of said indemnity mortgage, $69,000 of principal, together with all interest accrued thereon.

On March 17, 1890, the day of the date of said indemnity mortgage, appellants Kidder and Hulman, at the instance and request of said corporation, advanced their credit to it by becoming liable upon two notes, each for $3,000; one due five days after date and the other due in ten days after date, said appellants Kidder and Hulman, then fully relying upon said indemnity mortgage. At the maturity of said two notes for $3,000 each, said appellants, Kidder and Hulman, paid said two notes in full, in perfect good faith, and relying upon said indemnity mortgage as their security for repayment. Said two notes, taken together with the ten notes above mentioned, made a total amount advanced and paid out by said appellants McKeen, Hulman, Minshall, Kidder and Mayer, for and in behalf of said Sanford Fork and Tool Company, in good faith relying upon said indemnity mortgage, aggregating $75,000 of principal, together with whatever interest accrued thereon.

The said Robert Nixon mentioned in appellees' bill of complaint as a director of said corporation never paid any part or portion whatever of said aggregate amount of $75,000 and accrued interest. Appellants McKeen, Hulman, Minshall, Kidder and Mayer, paid said entire amount with their own individual means.

Said indemnity mortgage, dated March 17, 1890, upon which said appellants in good faith fully relied

when they made said payments amounting to $75,000 of principal, was a *second mortgage* upon all of the real estate and property described therein and covered thereby, and was and is subject to the prior (first) mortgage executed and delivered by the Sanford Fork and Tool Company on July 2, 1888, to secure the payment of fifty bonds for $1,000 each, dated July 2, 1888, payable July 2, 1898, with interest at the rate of 6 per cent. per annum, payable semi-annually on the second days of January and July of each year; all of which bonds, secured by first mortgage, were issued and sold shortly after the date thereof, and were outstanding for value at the date of said indemnity mortgage of March 17, 1890, and were and are a first and prior lien upon all the property covered and conveyed by said indemnity mortgage of March 17, 1890.

Record, pp. 29, 30, 27, 28.

The indemnity mortgage of March 17, 1890, did not cover or convey to Buena V. Marshall, Trustee, all, or anything like or near to all, of the property of, and belonging to, said Sanford Fork and Tool Company, but, on the contrary, left uncovered and unconveyed by said indemnity mortgage all of the merchandise, manufactured products, materials, furniture, bills receivable, accounts receivable, and a large tract of timber land of some four hundred acres, situated in Daviess County, Indiana, of, and belonging to, said corporation, and amounting in value to far more than the total sum secured by said indemnity mortgage. The amount and value of the property of said Sanford Fork and Tool Company left uncovered and unconveyed by said indemnity mortgage, was, by an appraisement thereof, made by good and competent appraisers, in May, 1890, under the orders and directions

of the Circuit Court of Vigo County, Indiana, ascertained to be $88,390.85. Record, pp. 19, 20.

In the appraisement of the property and assets of the Sanford Fork and Tool Company made in May, 1890, under the orders of the Vigo Circuit Court, the real estate, buildings, machinery and fixtures covered and conveyed by the first mortgage of July 2, 1888, to secure the payment of $50,000 of first mortgage bonds; and covered and conveyed by the indemnity mortgage of March 17, 1890,—as a *second mortgage* upon said manufacturing plant and machinery,—under and relying upon which indemnity mortgage appellants McKeen, Hulman, Minshall, Kidder and Mayer paid out upon the indebtedness of said Sanford Fork and Tool Company the sum of $75,000, and accrued interest,—were appraised at a total valuation of $116,055.39, showing that the property conveyed by said indemnity mortgage and also by said first mortgage, by an appraisement thereof made by good and competent appraisers, was and is greatly insufficient to pay and satisfy the principal sum secured by said *first mortgage* and accrued interest thereon, and the further sum of $75,000, and accrued interest thereon, paid out by said appellants McKeen, Hulman, Minshall, Kidder and Mayer, in good faith relying upon said indemnity mortgage.

In accepting said indemnity mortgage appellants McKeen, Hulman, Minshall, Kidder and Mayer acted in the utmost good faith with and towards all other creditors of said Sanford Fork and Tool Company. They left uncovered and unconveyed by their indemnity mortgage a far greater proportion of the assets of said corporation in proportion to the remaining unsecured indebtedness of said corporation than they took in tak-

ing said indemnity mortgage. All of the indemnity they did take by their indemnity mortgage was and is subject to the first and paramount lien of the said first mortgage securing the payment of $50,000, and accrued interest thereon, which first mortgage said appellants were and are obliged to protect and pay in order to avail themselves of any security whatever under their said indemnity mortgage.

The indemnity mortgage was dated March 17, 1890, was executed and acknowledged March 21, 1890, and was duly recorded on May 1, 1890, within the time allowed by the statute of Indiana for the recording of such instruments. The delay in recording said mortgage was not occasioned by any purpose, desire or intention of said appellants, or either of them, to conceal the existence of said mortgage or to induce any person, or persons, or corporation to give credit to said Sanford Fork and Tool Company in ignorance of the existence of said indemnity mortgage.

Neither of the appellees herein did give or extend to the Sanford Fork and Tool Company any credit, or sell to said corporation any goods or merchandise whatever, subsequent to March 17, 1890, the date of said indemnity mortgage. All of the indebtedness of the Sanford Fork and Tool Company to appellees, Howe, Brown & Co., Limited, Cortland Top and Rail Company, Limited, and Theodore Stevenson, occurred and existed prior to March 17, 1890, the date of said indemnity mortgage.

The claims of appellees, the Cortland Top and Rail Company and Theodore Stevenson,—both of said appellees being citizens and residents of Cortland, New York,—against the Sanford Fork and Tool Company, are not for goods or merchandise sold and delivered by

said appellees to said Sanford Fork and Tool Company, but are simply and solely claims growing out of an exchange of accommodation paper between the Sanford Fork and Tool Company and said appellees, the Cortland Top and Rail Company and Theodore Stevenson; neither of said appellees ever having sold or delivered to said Sanford Fork and Tool Company any goods or merchandise whatever. The exchange of accommodation paper between the Sanford Fork and Tool Company and said appellees, the Cortland Top and Rail Company and Theodore Stevenson, was for the mutual accommodation of said appellees and said corporation. The custom of such mutual exchange of accommodation paper grew out of the fact that citizens and residents of the city of Cortland, New York, who were pecuniarily interested in, and stockholders of, appellee, the Cortland Top and Rail Company, were largely instrumental in the creation and incorporation of the Sanford Fork and Tool Company.

Appellants McKeen, Hulman, Minshall, Kidder and Mayer, in their entire action in the premises, in accepting said indemnity mortgage, and in paying out $75,000, relying upon said indemnity mortgage, acted in the utmost good faith, and without fraud, collusion, concealment, conspiracy, or any purpose, desire or intention to deceive or defraud any creditor of the Sanford Fork and Tool Company. They lent their credit to, and advanced and paid out their money for the benefit of, said Sanford Fork and Tool Company in perfect good faith, and with the sole purpose and intention of enabling the said corporation to establish and successfully operate a profitable manufacturing industry. At the time they became liable for the large sums of

money herein above mentioned, and at the time said indemnity mortgage was executed and delivered, they fully believed that said Sanford Fork and Tool Company would, with their help in renewing and carrying for said corporation a portion of its indebtedness, be enabled to continue in full operation, and that it would ultimately be able to control a valuable and profitable trade. They then fully believed that said Sanford Fork and Tool Company was entirely solvent, and had property and assets amply sufficient, at the cost price thereof, to equal and far exceed all of its indebtedness; and then fully believed the property and assets of said corporation to be worth, as a manufacturing plant, the full cost price thereof.

On or about May 7, 1890, a suit was instituted in the Circuit Court of Vigo County, Indiana, by The National State Bank of Terre Haute, against the Sanford Fork and Tool Company and others, said suit being founded upon certain promissory notes due from said corporation to said Bank. Such proceedings were had in said suit that on or about May 13, 1890, appellant John W. Davis, was appointed by the Vigo Circuit Court, a receiver to take charge of all the assets of said Sanford Fork and Tool Company. Said receiver duly accepted his trust, filed the necessary bond, took charge and possession of all the assets and property of said Sanford Fork and Tool Company, and, pursuant to orders and directions of the Vigo Circuit Court, filed an inventory and appraisement of all the property of said corporation; the said appraisement being duly and legally made by good and competent appraisers.

All of the facts herein above stated are set forth in the answer of appellants, which answer is verified by

the oaths of appellants McKeen, Minshall, Kidder and Mayer. Appellant Hulman, being absent from Indiana when the amended answer was verified, did not make oath to its truth and correctness. But said appellant Hulman did verify the original answer of appellants, which contained all the material facts herein above stated. Record, pp. 11 to 23, inclusive.

On July 17, 1890, the appellees herein brought suit in the Circuit Court of the United States for the District of Indiana, asking the Court to cancel, and decree null and void, the indemnity mortgage of March 17, 1890.

Appellees' bill of complaint does not charge or aver that appellants McKeen, Hulman, Minshall, Kidder and Mayer, at the time they accepted the indemnity mortgage, knew or believed the Sanford Fork and Tool Company to be insolvent.

The bill of complaint does not charge or aver any fraudulent action upon the part of appellants, or either or any of them. It does charge that the indemnity mortgage was not filed for record in the county recorder's office until over forty days after its execution and delivery; but the bill of complaint *admits* that the indemnity mortgage was filed for record within the time allowed by the statute of Indiana for the filing of such instruments.

The bill of complaint does not aver or charge that the appellees or either of them sold any goods or merchandise to the Sanford Fork and Tool Company, or extended to it any credit in any manner whatever, subsequent to March 17, 1890, the date of said indemnity mortgage.

The bill of complaint does not disclose the fact

that appellants McKeen, Hulman, Minshall, Kidder and Mayer, in accepting said indemnity mortgage, left over $88,000 of property and assets of said Sanford Fork and Tool Company uncovered and unconveyed by said indemnity mortgage, and subject to the claims of said appellees against the Sanford Fork and Tool Company. Neither does the bill of complaint show, or specify by names and amounts, that any other unsecured indebtedness of said Sanford Fork and Tool Company existed, excepting only the claims of said appellees and the notes upon which the suit of the National State Bank of Terre Haute against said Sanford Fork and Tool Company was founded. It does make a general charge of large indebtedness.

The bill of complaint is not verified.

Record, pp. 1 to 10, inclusive.

On January 18, 1891, appellees filed their exceptions to the answer of appellants. These exceptions fall far short of complying with any rules or precedents regarding exceptions which have fallen under our notice. The statement called the first exception is not an exception to any part or averment of the answer; neither is it sufficient to constitute a demurrer to the answer as a whole, if that were allowable. The second, so called, exception sets out in full the entire answer of appellants, and purports to except to said answer as a whole, without pointing out or stating any exception or objection to any specific part, statement, or averment of said answer. If this is a legal and proper exception we have failed to properly understand the rules touching exceptions to an answer in chancery.

Record, pp. 32 to 43, inclusive.

Appellees' third exception to appellants' answer

avers that appellants have not, in their answer, answered, denied or avoided the averments of appellees' bill charging that at the date of the execution of said indemnity mortgage the Sanford Fork and Tool Company was insolvent, *and was then known by said directors to be insolvent.* Record, p. 43.

It is a sufficient answer to this exception to state that *the bill of complaint does not aver that McKeen, Hulman, Minshall, Kidder and Mayer, or either or any of them, knew the Sanford Fork and Tool Company to be insolvent at the date of the execution of said indemnity mortgage.* On the contrary, the sworn answer of appellants contains not less than three specific averments that at the date of the execution of said indemnity mortgage appellants McKeen, Hulman, Minshall, Kidder and Mayer fully believed the Sanford Fork and Tool Company to be solvent and possessed of property and assets sufficient, and more than sufficient, to pay its entire indebtedness. Record, pp. 16 ,17, 22.

Appellees' fourth exception is directed to the averments of the answer showing that the appellees herein did not, nor did any or either of them, sell any goods or merchandise to the Sanford Fork and Tool Company, or extend any credit whatever to it, subsequent to March 17, 1890, the date of said indemnity mortgage; on the alleged ground that said facts are immaterial. That averment of the answer was designed to answer the charge in the bill of complaint that the beneficiaries in said indemnity mortgage, "although they knew that the plaintiff, the said Howe, Brown & Company, and the said Cortland Top and Rail Company, had been giving credit to the said defendant corporation and *were still selling*, and liable to sell, other merchandise to said

defendant corporation, withheld all notice from them of the execution of said mortgage, as did also the defendant, the said Sanford Fork and Tool Company."

The substance of appellees' fifth exception is found in the last paragraph thereof, in the charge that appellants' answer contains no denial that the Sanford Fork and Tool Company was insolvent when said indemnity mortgage was executed. Record, pp. 43, 44, 45.

It is sufficient answer to this exception to again state that the answer contains three distinct averments to the effect that at the date of the execution of said indemnity mortgage appellants fully believed the Sanford Fork and Tool Company to be solvent, and possessed of property and assets sufficient, and far more than sufficient, to pay and satisfy all of its existing indebtedness. Record, pp. 16, 17, 22.

The Circuit Court sustained appellees' exceptions to appellants' answer and entered a decree cancelling, and setting aside as null and void, the indemnity mortgage dated March 17, 1890; to which decree and every finding and part thereof appellants excepted and prayed appeal to this Court which was granted upon their giving a supersedeas bond in the sum of $12,000. Appellants gave the required bond which was duly approved by the Court. Record, pp. 53, 54.

ASSIGNMENT OF ERRORS.

The errors assigned by appellants are as follows:

1. The Circuit Court erred in sustaining the exceptions of the complainants to the answer of the defendants—appellants herein.

2. The Circuit Court erred in adjudging and decreeing that the mortgage mentioned and described

in the complainants' bill of complaint was and is invalid and void.

3. The Circuit Court erred in adjudging and decreeing that the complainants—appellees herein—are entitled to and do receive a full *pro rata* share of the proceeds of the sale of the property and assets of the Sanford Fork and Tool Company as though said mortgage by said Sanford Fork and Tool Company to said other defendants—appellants herein—mentioned and described in complainants' bill of complaint, had never been executed and delivered to said defendants—appellants herein—mentioned in said mortgage; and said Circuit Court further erred in adjudging and decreeing that said defendants—appellants herein—named in and made beneficiaries in said mortgage, do take nothing whatever from the assets or from the proceeds of sale of said Sanford Fork and Tool Company by reason of or on account of said mortgage executed by said Sanford Fork and Tool Company to said other defendants —appellants herein.

Under the facts above stated,—all of which are set forth in the verified answer of appellants,—appellants insist that the mortgage of March 17, 1890, executed by Sanford Fork and Tool Company, to secure McKeen, Hulman, Minshall, Kidder and Mayer, upon their indorsements for said Company, and to secure the repayment of advances made and moneys paid by them for the benefit of said Company, is legal, valid and binding; and is not, either in law or equity, invalid and void.

On December 9, 1890, Hon. W. A. Woods, then District Judge, overruled appellants' demurrer to appellee's original bill of complaint in a written opinion which appears in 44 Fed. Rep., pp. 231-234. This

opinion was not copied by the clerk in making up the transcript in this case, and cannot properly be regarded as a ruling upon the question here involved, because, after this ruling, the original complaint was amended by interlineation, appellants filed answer, and afterwards, by leave of Court, filed an amended answer, to which amended answer appellees filed exceptions, and on May 21, 1891, Judge Woods sustained appellees' exceptions and rendered the decree here appealed from.

Record, p. 53.

In the opinion above referred to,—44 Fed. Rep., 231,—Judge Woods, in the first instance, based his ruling chiefly upon his decision and opinion in *Lippincott* v. *Shaw Carriage Co.*, 25 Fed. Rep., 577;—which was, as will hereinafter be shown, a widely different case, and very easily distinguished in principle, from the case at bar.

But upon examination of the recent decisions bearing upon the point he was then considering, Judge Woods found it necessary to admit, and, in the opinion as it appears in 44 Fed. Rep., 233, does admit, that the current of the recent and thoroughly considered decisions of this Court, and many other Courts of last resort, is opposed to the ground upon which he originally based his ruling in overruling appellants' demurrer to the original bill of complaint of appellees in the case at bar.

He therefore took an advanced position, and, in effect, based his ruling in overruling appellants' demurrer to appellees' original complaint, upon the ground that *public policy* forbids such transactions as the one set forth in appellees' bill of complaint herein.

It is respectfully submitted that public policy does

not forbid, but, on the contrary, upholds just such transactions between private corporations and their directors as are set forth in the verified answer of appellants to the bill of complaint in the case now at bar. If this is not true this Court, and many other Courts, whose decisions will be hereinafter cited and considered, have signally failed to correctly interpret public policy in so far as it constitutes part and parcel of equity jurisprudence.

BRIEF.

Points and Authorities.

I.

THE FACT THAT APPELLANTS McKEEN, HULMAN, MINSHALL AND KIDDER WERE BOTH STOCKHOLDERS AND DIRECTORS, AND THAT APPELLANT MAYER WAS A STOCKHOLDER, OF THE SANFORD FORK AND TOOL COMPANY AT THE TIME SAID APPELLANTS ACCEPTED FROM SAID CORPORATION THE MORTGAGE OF MARCH 17, 1890, AND AT THE TIME THEY PAID OUT THE SUM OF SEVENTY-FIVE THOUSAND DOLLARS UPON THE INDEBTEDNESS OF SAID CORPORATION, RELYING UPON SAID MORTGAGE, DOES NOT RENDER SAID MORTGAGE VOID, EITHER IN LAW OR EQUITY, FOR THE FOLLOWING REASONS:

1. *Because said mortgage was not executed and delivered by the Sanford Fork and Tool Company, and was not accepted by said appellants, in contemplation, expectation or belief of the insolvency of said corporation.*

2. *Because said mortgage was executed by said corporation, and was accepted by said appellants, in perfect good faith, and in the belief that said corporation was solvent; and would continue so to be if aided by appellants in overcoming a temporary embarrassment occasioned by the failure*

of the corporation to find a ready market for the sale of its manufactured products.

3. *Because, at the time said corporation executed and delivered, and said appellants accepted, said mortgage, and for a considerable period of time thereafter, said corporation was a "going concern" in full operation as a manufacturing establishment; and the managers of said manufacturing plant, and said appellants, then expected, intended and fully believed, that said corporation would continue a "going concern," and would be enabled to continue in full and successful operation, and pay its accruing liabilities in the usual course of business, by the procurement of the extension of time guaranteed to it upon the items of indebtedness described in said mortgage, and the further financial aid extended to it, by appellants, upon, and by reason of, its execution and delivery of said mortgage.*

4. *Because appellants McKeen, Hulman, Minshall, Kidder and Mayer,—instead of seeking an inequitable advantage over other creditors by requiring the execution and delivery, for their benefit and security, of a mortgage covering* ALL *of the property of the corporation,—accepted, as their only security and indemnity, a* SECOND MORTGAGE *covering* A PART ONLY *of the property of the corporation; leaving property and assets of said corporation of the appraised value of over $88,000.00 entirely unencumbered by any mortgage.*

By accepting this SECOND MORTGAGE *appellants practically obligated themselves to protect the corporation and its creditors against the* FIRST MORTGAGE,—*which was given to secure the payment of $50,000.00 of first mortgage bonds,—and, if need be, pay off said* FIRST MORTGAGE, *or forego all security under their* SECOND MORTGAGE.

5. *Because every dollar of the seventy-five thousand*

dollars for the payment of which appellants McKeen, Hulman, Minshall, Kidder and Mayer originally became sureties for the Sanford Fork and Tool Company, and which said appellants finally paid in full with their individual means, in good faith relying upon the mortgage of March 17, 1890, as their security for such payments, went directly into the property and assets of said corporation; neither of said appellants ever having received any personal or pecuniary benefit whatever from said payments, or from or on account of the indebtedness of said corporation liquidated by said payments: And because said appellants lent their credit to, and paid out their money for the benefit of, said Sanford Fork and Tool Company, in perfect good faith believing that said corporation owned property and assets sufficient, and more than sufficient, to pay all of its liabilities; and believing that it was only necessary to aid the corporation through a temporary pecuniary embarrassment in order to insure the permanent success of said corporation as a prosperous and profitable manufacturing company.

The following authorities, in our opinion, fully support, and conclusively establish, the above proposition, and reasons stated in support thereof:

Twin Lick Oil Co. v. *Marbury*, 91 U. S., 587, 588, 589.

Hotel Co. v. *Wade*, 97 U. S., 21, 22, 23.

Richardson's Executor v. *Green*, 133 U. S., 30, 43.

Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S., 109, 110.

Leavenworth v. *Chicago, Rock Island and Pacific Ry. Co.*, 134 U. S., 705, 706, 707.

Gould v. *Little Rock, M. R. and T. Ry. Co.*, 52 Fed. R., 684, 685, 686.

Coe v. *East and West R. R. Co., of Alabama*, 52 Fed. R., 531, 543.

Hills v. *Stockwell and Darragh Furniture Co.*, 23 Fed. R., 433, 434, 435.

Brown v. *Furniture Co.*, 58 Fed. R., 291, 292, 293; S. C., 7 C. C. A., 225.

County Court v. *Baltimore and Ohio R. R. Co.*, 35 Fed. R., 167, 168.

Sutton Manufacturing Co. v. *Hutchinson*, 63 Fed. R., 501.

Duncomb, et al., v. *N. Y. H. & N. R. R. Co.*, 84 N. Y., 198, 199, 200.

Duncomb, et al., v. *N. Y. H. & N. R. R. Co.*, 88 N. Y., 6, 7, 8, 9.

Smith v. *Lansing*, 22 N. Y., 520.

Harts v. *Brown*, 77 Ill., 226, 260.

Reichwald v. *Hotel Co.*, 106 Ill., 439.

Merrick v. *Peru Coal Co.*, 61 Ill., 472.

Ashhurst's Appeal, 60 Penn. State, 291.

Stratton v. *Allen*, 16 N. J. Eq., 229.

Barnes v. *Trenton Gas Light Co.*, 27 N. J. Eq., 33.

Wilkinson v. *Bauerle*, 41 N. J. Eq., 635, 645.

Whittaker v. *Amwell Nat. Bank*, (N. J. Ch.) 29 Atl. R., 203.

Planters' Bank v. *Whittle*, 78 Va., 737.

Hopson v. *Aetna Axle & Spring Co.*, 50 Conn., 597.

Smith v. *Skeary*, 47 Conn., 47, 53.

Sargeant v. *Webster*, 13 Metc. (Mass.), 497.

Holt v. *Bennett*, 146 Mass., 437.

Saltmarsh v. *Spaulding*, 147 Mass., 224.

McMurtry v. *Montgomery Masonic Temple Co.*, 86 Ky., 206.

Whitwell v. *Warner*, 20 Vt., 425.

Hospes v. *Car Co.*, 48 Minn., 174.

Sims v. *Railroad Co.*, 37 Ohio St., 556.

Buell v. *Buckingham*, 16 Iowa, 284.

Farmers and Merchants' Bank of Lineville v. *Wasson*, 48 Iowa, 336.

Hallam v. *Indianola Hotel Co.*, 56 Iowa, 178.

Garrett v. *Burlington Plow Co.*, 70 Iowa, 697.

Warfield v. *Marshall County Canning Co.*, 72 Iowa, 666.

Kitchen v. *Railway Co.*, 69 Mo., 224.

Foster v. *Belcher's Sugar Refining Co.*, 118 Mo., 238.

Sabin v. *Columbia River Lumber and Fuel Co.*, (Oregon) 34 Pacific R., 693, 696.

Gorder v. *Plattsmouth Canning Co.*, (Neb.) 54 N. W. R., 830, 833, 834.

At the risk of unduly extending this brief, we venture to quote brief extracts from a number of the decisions above cited.

In *Twin Lick Oil Co.* v. *Marbury*, *supra*, Mr. Justice Miller said:

"While it is true that the defendant, as director of the corporation, was bound by all those rules of conscientious fairness which Courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

In *Hotel Co.* v. *Wade*, *supra*, Mr. Justice Clifford said:

"His finding is that the bonds and mortgages are not void upon the ground that the lenders of the money were also the directors of the company; that the terms of the contract were sanctioned by the stockholders; and that the money loaned was needed to complete the building, and that it was applied to effect the purpose for which it was borrowed. * * * Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the evidence fails to support the proposition that the bonds and mortgage are invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred, and it has never been held that the arrangement was invalid where in appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence."

In *Richardson's Executor* v. *Green*, *supra*, Mr. Justice Lamar said:

"Richardson's relation to the subject matter of this controversy was threefold: (1.) That of a creditor of an insolvent corporation claiming for his debt priority of payment over those of all other creditors, out of the fund arising from a foreclosure sale of the mortgaged property; (2) that of a director and officer of that corporation at the time his debt against it was created; and (3) that of the largest shareholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

In *Fitzgerald Construction Co.* v. *Fitzgerald*, *supra*, Mr. Chief Justice Fuller said:

"The company was liable upon the original indebt-

edness, and its change of form in order to relieve the pressure of the creditors was by the direction, with the participation, and at the request of the president. We perceive no want of power and no omission of essential formalities in what was done. And *the mere fact that Fitzgerald was a stockholder in and a promoter and director of the company, and, with the president, the manager of the work in the prosecution of which the indebtedness arose, would not change the binding character of the obligation. Twin Lick Oil Co.* v. *Marbury*, 91 U. S., 587; *Gardner* v. *Butler*, 30 N. J. Eq., 702, 721; *Harts* v. *Brown*, 77 Illinois, 226."

In *Drury* v. *Cross*, 7 Wall., 303, Mr. Justice Davis said:

"At the time this scheme was initiated, there were only five miles of track laid, the company hopelessly insolvent, and the enterprise abandoned. In this condition of things the directors were sued on their indorsement, and, as was natural, manifested an anxiety to have the property of the company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. *The directors, in furnishing them this indemnity, in order to procure the enforcement of the mortgage lien to the extent of $42,000, which in their hands was a just debt against the company, were guilty of no wrong.*"

In *Gould* v. *Little Rock, M. R. & T. Ry. Co., supra*, Caldwell, J., said:

"It is next contended that the deed of trust is void because it was executed to secure debts due to persons who were directors of the corporation, and large holders of its stock and mortgage bonds. The money was actually advanced by the directors in good faith for the benefit of the company, and was used by the company for legitimate corporate purposes. It was not loaned or advanced for the purpose of obtaining any advantage over the corporation or its other stockholders or creditors, but to conserve and protect the best interests of all persons interested in the property. It is obvious that the directors who made these advances did not do so from choice, or because they esteemed it a safe or

profitable investment in itself. They made the advances because the corporation stood in pressing need of the money, and its failure to get it was likely to result injuriously to all its creditors and stockholders. The inducement to make the loan was to protect and give value to their own large interests as creditors and stockholders of the corporation; but all other creditors and stockholders, in proportion to their interests, were equally protected and benefited by the loan. Upon these facts, the deed of trust executed by the direction of the stockholders and board of directors to secure the advances previously made by these four directors to the company is a valid security. The advances constituted a valid debt against the corporation, which it was legally liable to pay, and could have been compelled to pay by suit. Where a corporation is legally liable to pay a debt, it may undoubtedly give security for its payment. The use of its property to pay or secure a *bona fide* debt is not an unlawful use or diversion of its property, no matter what official relation the creditor sustains to the corporation. The corporation is under the same obligation to pay a *bona fide* debt due to one of its directors and stockholders that it is to pay a debt due to a stranger, and a security given for a debt due to a director and stockholder is as valid as a security given to any other creditor. The doctrine established by the best-considered cases and by the decisions of the supreme court of the United States is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a *bona fide* loan of money previously made to such corporation, and used by it in conducting its legitimate corporate business."

In *County Court* v. *Baltimore and Ohio R. R. Co.*, *supra*, Jackson, J., said:

"The evidence shows that the Grafton & Greenbrier Company, being hard pressed, and having little or no credit, was compelled to negotiate loans for the further prosecution of its work, and to relieve it from present embarrassment. To secure the loans desired it became necessary for some of the directors to become guarantors of the company for these loans, otherwise it would have been unable to negotiate them. It is not

an uncommon thing that the directors of an important improvement are compelled to lend their personal responsibility to a company in order to give it credit and secure means to carry on its operations. Many improvements would languish and die if this action upon the part of the directors was held by the courts of the country to be illegal, and to render them incompetent to act in that capacity. In this case the directors were not primarily liable. The company had already exhausted its credit, and they only became guarantors to the creditors to the extent that money was borrowed upon their personal responsibility. And in the language of the Supreme Court of New York, in the case of *Duncomb* v. *Railroad Co.*, 88 N. Y., 9: 'They were under no personal obligation originally, in contracting the debt, and no reason is shown why they were not justified in placing the company in a position to pay its indebtedness and to relieve it from embarrassment.' * * * The money that was raised under the contract of April 7, 1887, was altogether expended in discharge of liabilities and debts of this company, in which, so far as the evidence discloses, not a single director was primarily liable, nor did any director receive any personal benefit, so far as we can perceive, from the contract that was then entered into. Upon this point the law is clearly stated by Mor. Priv. Corp., § 527. He says: 'To prohibit the directors in all cases from dealing with the corporation would often deprive the latter, in time of need, of the assistance of those persons who have the greatest interest in its welfare, and who are willing to give their aid upon the most reasonable terms.' For these reasons we are of the opinion that no improper action was taken by the board of directors at the time that the contract was entered into, and that the transaction was of an unexceptionable character."

In *Sutton Manufacturing Co.* v. *Hutchinson*, *supra*, Mr. Justice Harlan, presiding in Circuit Court of Appeals, Seventh Circuit, said:

"Undoubtedly a solvent corporation, if not forbidden by its charter, may mortgage its property to secure the performance of obligations assumed before or at the time of the execution of the mortgage. So a

mortgage executed by a corporation whose debts exceed its assets, to secure a liability incurred by it or on its behalf, will be sustained, if it appears to have been given in good faith to keep the corporation upon its feet and enable it to continue the prosecution of its business. A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and duty when attempting, in good faith, by the exercise of its lawful powers and the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him. Of course, in cases of that kind, a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property."

In *Gorder, et al.*, v. *Plattsmouth Canning Co., et al.*, *supra*, the Supreme Court of Nebraska held that:

"The relation of the directors to stockholders of a corporation is of a fiduciary character, and their contracts and dealings, with respect to the corporate property, will be carefully scrutinized by the courts. *Such contracts are not, however, necessarily void. When it is clear that the transaction is in good faith on the part of the director, and beneficial to the corporation*, which has, with the sanction of the stockholders, received and appropriated the consideration without offering to make restitution, it may be upheld, when assailed, even in a court of equity."

In *Sabin* v. *Columbia River Lumber and Fuel Co.*, *supra*, the Supreme Court of Oregon said:

"So long as a corporation is a 'going concern,' engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities to the extent shown by testimony in this case, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, even though the debt may be one for which the directors are security."

In *Warfield* v. *Marshall County Canning Co.*, *supra*, the Supreme Court of Iowa, on full consideration, held that:

"A mortgage given by a corporation to persons who are its officers and directors, to secure a *bona fide* indebtedness, and with no fraudulent intent, will not be set aside at the suit of another creditor *merely because of the relationship of the parties.*"

In *Buell* v. *Buckingham*, *supra*, the Supreme Court of Iowa held that:

"A sale of *all* the property of an *insolvent* corporation to a director, who is also president, in payment of his debt, cannot be set aside by other corporate creditors."

In *Garrett* v. *Burlington Plow Co.*, *supra*, the mortgage in question was given by the Plow Company to secure indebtedness to certain of its directors, and to secure said directors, or some of them, against liability as indorsers for the company. Shortly after the mortgage was executed the Plow Company made a general assignment of its property for the benefit of its creditors. In deciding the case the Supreme Court of Iowa said:

"The mortgage is assailed on the ground that the payees of two of the notes were stockholders and directors in the Plow Company, or held such relations to the directors that their rights were no other than the rights held by the directors.

"The transaction, so far as it involves the indebt-

edness to the Iowa State Savings Bank, is questioned upon the ground that the directors of the company are indorsers or guarantors upon the note given therefor. * * *

"May a director enforce such a debt? We understand that he may become a creditor of the corporation, may advance it money or sell it property, and obligations of the corporation executed therefor may be enforced by him. In this regard he occupies no different position than that of any other creditor; and if the debt he holds was contracted in good faith, and there is an absence of fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim.

"Counsel for defendant admit this proposition, with the exception in the case of the insolvency of the corporation. They insist that the directors of an insolvent corporation cannot take from it security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security. If the property, money, or other consideration of the debt, was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors."

In *Ashhurst's Appeal*, *supra*, Strong, J., in announcing the decision of the Supreme Court of Pennsylvania, said:

"There must be many things which directors can

do for their individual benefit which are binding upon a corporation of which they are directors. If they have advanced money I cannot doubt they may pay themselves with the corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity."

Precisely the same doctrine is held in the two cases of *Duncomb, et al.*, v. *N. Y. H. & N. R. R. Co.*, 84 N. Y., 198, 199, 200: and 88 N. Y., 6, 7, 8, 9.

In *Merrick* v. *Peru Coal Company*, *supra*, the Supreme Court of Illinois held:

"A member of or officer of a corporation, has the same right to deal with it in the same manner as strangers, and in so doing acquires the same rights and incurs the same liabilities as they would."

In *Hopson* v. *Aetna Axle and Spring Co.*, *supra*, the Supreme Court of Connecticut held as follows:

"In order to enable a manufacturing corporation to pay its debts and carry on its business, its directors may guarantee payment of its notes made to its own order, and take as security for their liability its mortgage of all or substantially all of its property."

In *Whittaker* v. *Amwell Nat. Bank*, *supra*, the court of last resort of New Jersey, held:

"The directors of a corporation may execute to themselves mortgages to secure the liability of the corporation *to them*, even though this be done in contemplation of immediate application for the appointment of a receiver, and the lien secured thereby will be prior to those of general creditors."

In *Wilkinson* v. *Bauerle*, *supra*, the New Jersey Supreme Court held that:

"A corporation may prefer its directors, when they are creditors of the corporation, if the transaction is in good faith."

In *Stratton* v. *Allen*, *supra*, the Supreme Court of New Jersey held:

"Directors of a corporation may make contracts with it like any other individual, and when the contract is made, the director as to the contract stands in the relation of a stranger to the corporation."

In *Planters' Bank* v. *Whittle*, *supra*, the Supreme Court of Virginia held as follows:

"A corporation, to secure certain of its notes in which the directors were accommodation indorsers, assigned certain bonds which were part of its assets, at a time when suits were pending against it for the appointment of a receiver. Held: The assignment, if made in good faith, was valid."

The authorities above cited and quoted fully support, and many of them go far beyond fully supporting, our proposition that the mortgage here involved is valid, and that the Circuit Court erred in holding it void.

A majority of these authorities,—and the list might easily be greatly extended,—hold that private corporations may,—*in good-faith, bona fide transactions*,—secure by mortgage or pledge of their corporate property, debts due to, and liabilities incurred in their behalf and for their benefit, by their directors; when the money or credit advanced to the corporation by its directors has gone directly to the benefit of the corporation, and thereby increased the corporate assets, *even although the corporation may then be known to be insolvent, and although such mortgage or pledge of its corporate property may be given in contemplation of the immediate appointment of a receiver.*

The case at bar falls far within the limits of the propositions established by these authorities. In this case the verified answer contains express averments:

1. That the managers, as well as the directors, of the Sanford Fork and Tool Company did not believe

the corporation to be insolvent at the time the mortgage here involved was executed and accepted; but, on the contrary, then believed the corporation solvent and possessed of assets sufficient, and more than sufficient, to meet all of its liabilities:

2. That the mortgage was not executed by the corporation, or accepted by appellants McKeen, Hulman, Minshall, Kidder and Mayer, in contemplation or expectation of the insolvency of the company; but, on the contrary, in the full, and good-faith, belief that, with the temporary financial aid procured by means of said mortgage, the company would be enabled to continue, as it then was, a "going concern" in full operation as a large manufacturing establishment, and that it would soon reach a position of assured permanent and profitable success:

3. That the corporation did continue a "going concern" for a considerable period after the execution of said mortgage, paying its liabilities and maturing obligations,—other than those extended and provided for by means of said mortgage,—in the ordinary course of business; such payments so made after the execution of said mortgage aggregating more than $30,000:

4. That the mortgage executed for the security of appellants McKeen, Hulman, Minshall, Kidder and Mayer, *did not cover or include all of the property of said corporation, but, on the contrary, was a second mortgage upon all the property it did cover and include,—the same being only a part of the property of the corporation; and that said mortgage left entirely unencumbered property and assets of said corporation of the appraised value of $88,390.85.*—Record, p. 20: And,

5. That every dollar procured by the notes upon which appellants McKeen, Hulman, Minshall, Kidder and Mayer, became indorsers for the Company, and which said appellants paid, in good faith relying upon said mortgage as their security, went directly into the property and assets of said corporation, neither of said appellants McKeen, Hulman, Minshall, Kidder and Mayer ever having received any personal or pecuniary benefit whatever from the money procured by means of said notes upon which they were indorsers; and that the entire action of said appellants was in the utmost good faith, and in the honest belief that temporary aid extended by them would enable the Company to continue in full operation, and in a short time achieve permanent and profitable success.

If a mortgage executed and accepted under the facts disclosed by the sworn answer in this case is held void; it can only be so held by holding that a director of a private manufacturing corporation can never, under any circumstances, lend his money or his credit to the corporation of which he is a director, and take from such corporation security for the money or credit so lent, unless such director can, at any and all times thereafter prove that the corporation was,—at the time such security was given to and accepted by such director,—absolutely solvent and possessed of assets and property amply sufficient to meet every possible then outstanding liability, whether actual or contingent.

The authorities herein above cited seem to quite conclusively establish the point that any such holding cannot be supported either in law or equity.

It is very certain that the establishment of such a proposition as the law of the land would injure private

corporations, and their creditors, infinitely more than it would benefit either: Because if such a holding were established as the law, it would effectually prevent directors and stockholders of private corporations, from aiding their corporations to overcome what is honestly believed to be only temporary financial embarrassment, and would thereby drive many corporations into needless bankruptcy, and inflict needless loss upon their creditors.

In fact the case at bar stands substantially alone *in holding and decreeing void*, a security given by a corporation to some of its directors and stockholders to secure them for money lent to, and liabilities incurred in behalf of, the corporation:—in the face of a complaint in which no bad faith is charged against appellants, or either of them; in which it is not alleged that appellants, or any of them, did anything with intent to defraud any creditor of the corporation, or to obtain any personal benefit from the corporation; and in which complaint it is admitted that the corporation was, at the time it gave said mortgage security, a "going concern" in full operation, and in full possession and control of its property and assets, and continued to be such "going concern" in full possession and control of all of its property, for a considerable period after giving such mortgage, carrying on its business and meeting its maturing obligations in the ordinary course of business:—and in the face of a verified answer averring that appellants fully believed the company to be solvent when they accepted said mortgage security; that, in lending their credit to, and paying out their money for the benefit of, said corporation, they acted in perfect good faith, and without any personal or pecuniary

benefit to them, or either of them; and that said corporation then was, and for about two months thereafter continued to be, a "going concern," in full control of all of its property and assets, carrying on its corporate business, and meeting its maturing obligations, in the usual course of business.

The authorities cited by the Circuit Court in the opinion rendered on appellants' demurrer to the original complaint of appellees, and before appellants' answer was filed,—which opinion has been herein above cited and considered,—certainly fall far short of sustaining the decree finally rendered in this case upon the exceptions to the answer of appellants.

The Circuit Court,—Hon. W. A. Woods, then District Judge, presiding,—based his findings and opinion in the case at bar, largely upon his decision previously rendered in *Lippincott* v. *Carriage Co.*, 25 Fed. Rep., 577.

That case is widely different from, and very easily distinguished from, the case at bar. In that case the mortgages set aside as fraudulent and void, were given at a time when both the mortgagor company and the mortgagees well knew that the Carriage Co. was hopelessly insolvent,—a mere shell and wreck. Even when the notes were given, which were afterwards secured by the mortgages which were held fraudulent and void, both the Carriage Co. and the mortgagees—the banks,—well knew that the money procured on the notes was not to go into the business and assets of the Carriage Co., and was not procured for the purpose of carrying on the business of the Carriage Co., and to keep it a "going concern," but that, on the contrary, every dollar of the money procured on said notes was to go, and

did go, to make good the defalcation of Shaw,—president of the Carriage Co.,— as treasurer of the State of Indiana, and to enable him to make settlement with his successor in said State office.

How the decision of a case presenting such a state of facts can be regarded as authority in support of the decree rendered in the case at bar upon the facts averred in appellants' verified answer,—which facts as averred must be taken as true upon exceptions to the answer,—is beyond our comprehension.

Neither is the decision in *Hutchinson* v. *Sutton Manufacturing Co.*, 57 Fed. Rep., 998,—decided by Hon. J. H. Baker, District Judge, District of Indiana,—at all in point as an authority in behalf of appellees in the case at bar.

In that case the *Hopper Lumber and Manufacturing Co.* executed a mortgage, *covering its entire corporate property of every character and description, to the Sutton Manufacturing Co.* to secure *accommodation paper* drawn by the Hopper Co. on the Sutton Co., and accepted by the Sutton Co. for the sole accommodation of the Hopper Co., and without consideration. James S. Hopper, Henry S. Hopper and Benjamin F. Sutton were directors of the Sutton Co. James S. Hopper, Henry S. Hopper and Fannie A. Hopper,—who is the sister of Benjamin F. Sutton,—were directors of the Hopper Co. James S. Hopper was president of both corporations. Henry S. Hopper was secretary, treasurer, and manager of the Sutton Co., and was also secretary of the Hopper Co., of which last named company James S. Hopper was manager as well as president.

The mortgage was executed in the forenoon, and in the afternoon of the same day the Hopper Co. made a general assignment to Hutchinson.

The record leaves no room to doubt but that all parties to the transaction knew perfectly that the Hopper Co. was utterly and hopelessly insolvent; and that it intended to suspend all further prosecution of its corporate business immediately upon the execution of the mortgage covering its entire property and assets to the Sutton Co.

Hutchinson, as assignee of the Hopper Co., brought suit to cancel the mortgage to the Sutton Co.

In that suit Judge Baker, very rightfully, held:

"A business corporation has no power to accept accommodation paper, and the officers who cause it to make such acceptance are personally responsible to it for payments made or liabilities incurred in consequence thereof.

"Where the controlling directors of two corporations are the same persons, a preferential mortgage given by one to the other as security for payments and liabilities resulting from an acceptance of drafts by the latter for accommodation of the former is invalid, because it operates to protect the officers of the accepting company against personal liability for their maladministration in accepting paper for accommodation."

The Sutton Co. prosecuted an appeal to the U. S. Circuit Court of Appeals. The appeal was decided in October, 1894, Mr. Justice Harlan announcing an opinion affirming the decision of Judge Baker. This last decision appears in 63 Fed. Rep., 496–507. We have herein above quoted an extract from the opinion of Mr. Justice Harlan, in support of our proposition now under discussion.

We submit that under a vast majority of decided cases involving the question at bar, and especially under the decisions of this Court touching that question, the mortgage here involved is *valid;* and that the Circuit Court erred in decreeing it void.

II.

THE PROPOSITION OR THEORY THAT THE DIRECTORS OF A PRIVATE MANUFACTURING CORPORATION ARE TRUSTEES FOR ITS CREDITORS, WHILE IT IS A "GOING CONCERN" IN FULL POSSESSION AND CONTROL OF ALL OF ITS CORPORATE PROPERTY AND ASSETS, BEFORE ANY SUSPENSION OF ITS BUSINESS BY REASON OF INABILITY TO MEET ITS CURRENT OBLIGATIONS AS THEY MATURE,—AND BEFORE ANY DISCLOSURE OF INSOLVENCY,—IS UNTENABLE.

EXACTLY THE CONTRARY DOCTRINE IS CLEARLY ESTABLISHED BY REPEATED DECISIONS OF THIS COURT.

In *Smith Purifier Co.* v. *McGroarty*, 136 U. S., 241, Mr. Justice Gray, in commenting upon the decision of the Supreme Court of the State of Ohio in *Rouse* v. *Merchants' Bank*, 46 Ohio State, 493,—which is one of the cases cited by Judge Woods in support of his ruling upon appellants' demurrer to the original bill of complaint of appellees in the case at bar,—said:

"That decision, it is true, proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors *in a wider and more general sense than could be maintained upon general principles of equity jurisprudence.*"

In *Graham* v. *Railroad Co.*, 102 U. S., 160, 161, Mr. Justice Bradley said:

"It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

"We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, *and is entitled to hold property* (if not contrary to its charter) *as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same.* * * *

"When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust-funds, *which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his.*"

In *Sawyer* v. *Hoag*, 17 Wall., 621, Mr. Justice Miller, in clearly and sharply defining the difference between capital stock and subscriptions to capital stock, of a private corporation, and ordinary assets of such private corporation, said:

"It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. *The debt ceases by this operation, if effectual, to be a trust-fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.*"

The following decisions are to the same general effect:

Richardson v. *Green*, 133 U. S., 43, 44.

Clark v. *Bever*, 139 U. S., 109–114.

Scovill v. *Thayer*, 105 U. S., 152.

Wabash, St. Louis and Pacific Railroad v. *Ham*, 114 U. S., 594.

The principle of law and equity established by these decisions cannot be misunderstood. Just so long as a private corporation continues in full operation, conducting its corporate business in the usual

manner, paying its current obligations as they mature, and holding full possession and control of its corporate property and assets, and *before any disclosure of insolvency;* the directors of such corporation are not trustees for the creditors of such corporation. Under such circumstances and facts such corporation has full power and right to sell its corporate property and make good title thereto; or to mortgage the same or any portion thereof to secure the payment of *bona fide* indebtedness of such corporation, the money or property for which such indebtedness accrued having gone directly into the property and assets of the corporation, whether such indebtedness is to a director of such corporation or to a stranger.

Directors of a private corporation only become trustees for the creditors of such corporation after the insolvency of such corporation is disclosed and known; at all events directors cannot be held to be trustees for creditors *until they know that the corporation of which they are directors is actually insolvent.*

III.

THERE IS NOTHING EITHER IN THE STATUTES OF INDIANA, OR IN THE DECISIONS OF THE SUPREME COURT OF INDIANA, TENDING TO TAKE THE CASE AT BAR OUT FROM UNDER THE PRINCIPLES OF LAW AND EQUITY FIRMLY ESTABLISHED BY THE AUTHORITIES CITED UNDER THE FIRST AND SECOND POINTS OF THIS BRIEF; ON THE CONTRARY, THE STATUTES, AND DECISIONS OF THE SUPREME COURT, OF INDIANA, ARE IN HARMONY WITH THE AUTHORITIES HEREIN ABOVE CITED AND CONSIDERED.

The Supreme Court of Indiana, in many cases, has held that dealings between directors and a corporation

of which they are directors are valid, and that contracts made between corporations and their directors, if not characterized by bad faith, will be upheld and enforced the same as contracts entered into between strangers and corporations.

Hill, et al., v. *Nisbet, et al.*, 100 Ind., 352, 353, 354.

The Bristol Milling and Manufacturing Co., et al., v. *Probasco*, 64 Ind., 412, 413.

Ward, et al., v. *Polk*, 70 Ind., 309.

Greensboro and New Castle Junction Turnpike Co. v. *Stratton*, 120 Ind., 294.

Polk v. *Reynolds, et al.*, 54 Ind., 449.

Insolvent corporations of Indiana may make assignments.

De Camp, et al., v. *Alward*, 52 Ind., 468.

Insolvent corporations may also prefer creditors.

Waterman on Corporations, Vol. 2, p. 134, *and authorities cited in Note 2.*

Morawetz on Private Corporations, 2d Ed., Vol. 2, Sec. 802.

Angell and Ames on Corporations, Sec. 187.

Coats v. *Donnell*, 94 N. Y., 168, 178.

Covert v. *Rogers*, 38 Mich., 363.

"At common law an insolvent debtor has the right to prefer any of his creditors."

Perry on Trusts, 3d Ed., Vol. 2, Sec. 586.

A corporation has the same right as a natural person to make an assignment for the benefit of its creditors; and it may make preferment among its creditors.

Perry on Trusts, 3d Ed., Vol. 2, Sec. 538.

Under the statutes of Indiana, an insolvent failing debtor has full right and power to prefer certain cred-

itors to the exclusion of others, by conveying his assets and property to such preferred creditor or creditors.

Hutchinson, Assignee, v. *The First National Bank of Michigan City*, 133 Ind., 271.

Stix, et al., v. *Sadler, et al.*, 109 Ind., 255, 258, 259.

Fisher, et al. v. *Syfers, et al.*, 109 Ind., 517, 519.

Gilbert, Assignee, et al., v. *McCorkle, et al.*, 110 Ind., 220, 221, 222.

Dice v. *Erwin*, 110 Ind., 561, 566, 567.

Shillito Co. v. *McConnell*, 130 Ind., 41.

Studebaker Bros. Mfg. Co. v. *Bird*, 119 Ind., 427, 429.

Purple, et al., v. *Farrington, et al.*, 119 Ind., 164, 170, 171.

Cushman, et al., v. *Gephart*, 97 Ind., 46, 51, 52.

Wilcoxon v. *Annesley*, 23 Ind., 290, 291.

Lord, et al., v. *Fisher, et al.*, 19 Ind., 7, 8, 9.

If private corporations, before suspension of business by reason of insolvency, have the same rights and powers touching the disposal of their property, the making of mortgages, the making of assignments, and the giving of preference to creditors, that individual debtors have,—which can hardly be questioned,—it would seem impossible to hold that these decisions of the Supreme Court of Indiana do not apply with equal force both to corporations,—in the condition above stated,—and to individual debtors.

Even if it be admitted that the directors of a private corporation become trustees for its creditors the moment the actual insolvency of the corporation is disclosed, or the moment the corporation suspends business by reason of the insolvency; that would not render these Indiana decisions inapplicable to the case at bar.

This is true because the mortgage given by the Sanford Fork and Tool Company for the security of McKeen, Hulman, Minshall, Kidder and Mayer, was given when neither the managers nor the directors believed the corporation to be insolvent but when they all believed it to be solvent and possessed of property and assets sufficient, and more than sufficient, to discharge all of its obligations, and at a time when it was in full operation, as a "going concern" in full possession and control of all its property and assets.

It should also be remembered that this mortgage was given and accepted in perfect good faith to secure the payment of money, every dollar of which went directly into the property and assets of the corporation; and that, instead of the directors seeking any unjust or inequitable benefit, or advantage, over other creditors, they accepted a *second mortgage* on a *part only* of the property of the corporation, leaving a large portion of the property of the corporation entirely unencumbered.

Under the authorities herein above cited, and under the facts averred in the verified answer of appellants,—which facts as averred in said answer must be taken as true, in ruling upon exceptions to said answer,—it is respectfully insisted that the Circuit Court erred in decreeing the mortgage of March 17, 1890, invalid and void.

Appellants, therefore, ask that the decree of the Circuit Court may be reversed.

Respectfully submitted,

JOHN M. BUTLER,
Solicitor for Appellants.

GEORGE A. KNIGHT,
Of Counsel.

Indianapolis, Ind., December 15, 1894.

157-312

Office Supreme Court, U. S.
FILED.
JAN 28 1895
JAMES H. McKENNEY,
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IN THE

SUPREME COURT OF THE UNITED STATES.

THE SANDFORD FORK AND TOOL COMPANY, WILLIAM R. McKEEN AND OTHERS, *Appellants.*

VS.

HOWE, BROWN & COMPANY, LIMITED; CORTLAND TOP AND RAIL COMPANY, LIMITED; AND THEODORE STEVENSON, *Appellees.*

No. 190.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF APPELLEES.

See 161 U.S. 247

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"THE QUESTION INVOLVED."

It is true, as stated by Appellants, that "the record in this Appeal presents for consideration and decision a single question." But it is not the question propounded by Appellants' brief, *as the whole record* clearly shows. The question should be stated thus: "CAN THE DIRECTORS OF A FAILING AND INSOLVENT CORPORATION, KNOWING THAT FACT, AND IN ANTICIPATION OF A FAILURE, *prefer* AND SECURE THEMSELVES, BY MORTGAGE, UPON ALMOST THE ENTIRE PROPERTY OF SAID CORPORATION AS ACCOMMODATION ENDORSERS ON LONG PAST DUE LIABILITIES OF SAID CORPORATION, OVER ALL OTHER CREDITORS OF SAID CORPORATION. NOTHING BEING, AT THE TIME OF SUCH PREFERENCE, ADVANCED OR PAID BY SAID DIRECTORS TO, OR FOR THE USE OF SAID CORPORATION. NO MONEY LOANED OR CREDIT GIVEN."

STATEMENT OF THE FACTS.

Prior to the 7th day of May, 1890, the Sandford Fork and Tool Company was a corporation, organized under the laws of Indiana. On said date, a suit was instituted by a creditor, for the appointment of a Receiver for said concern as an insolvent corporation. Record, p. 5. On the 13th day of May, a Receiver was appointed and took possession of said corporation's property of all kinds.

On the 2d day of July, 1888, said corporation mortgaged its real estate, "buildings, offices, shops, engines, boilers, machinery, fixtures and appurtenances on said real estate, and that might thereafter be erected, constructed and acquired," to secure an indebtedness of $50,000.00. See Exhibit E, Rec. p. 50. None of said debt had been paid at the time said Receiver was appointed. There was at the time the application was filed for a receivership an indebtedness amounting to $277,415.70. Of this indebtedness the Appellants, McKeen, Hulman, Nixon, Minshall, Mayer and Kidder, were endorsers for said Company upon notes aggregating $69,000.00. Rec., p. 39. Said notes having been executed between Sept. 18th, 1889, and March 3d, 1890. Rec., pp. 35–36. All of said endorsers were stockholders in said concern, owning the principal stock, and all, save Mayer, were Directors, being the entire Board, Kidder being president, and Nixon secretary.

Between December 30th, 1889, and March 13th, 1890, said corporation became indebted to the Appellees in several sums aggregating $12,033.39. Rec., p. 6. All of Appellees' claims were filed with the Receiver of said corporation and by him allowed as valid claims against the assets of said corporation. Rec., p. 6.

On the 1st of March, 1890, said Board of Directors, by their president and secretary, issued a call for a meeting of the stockholders, "for the purpose of authorizing the execution of a mortgage or mortgages covering the property of the Company, &c." Exhibit A, Rec. 24.

On the 15th of March, a meeting of stockholders was held and a resolution adopted authorizing the Directors to execute a mortgage or mortgages upon all or any part of the Company's property "to secure *any new indebtedness or liability of this Company*, &c." Ex. B, pp. 24–25.

On the same day the Directors met and ordered the execution of a mortgage to a trustee, to secure and indemnify said Board and Appellant Mayer, endorser with them, against loss by reason of such endorsements. Ex. C, pp. 25–26.

This was not "*new indebtedness*."

On the 17th day of March, the president and secretary of said Board of Directors did execute the mortgage now in controversy, on all the real estate, "buildings, offices, shops, engines and boilers, machinery, fixtures and appurtenances on said real estate," being their entire plant for manufacturing. Ex. D, Rec., pp. 27–29.

Nothing was secured by this mortgage save the notes, heretofore mentioned. They contracted indebtedness with Appellant, Howe, Brown & Co., after this call for a meeting of stockholders. See Rec., p. 12.

In the minutes of the meeting of said Directors, it is declared: "*Whereas, this Company is indebted in various other amounts (that is, to persons other than Appellants) to sundry persons and has been and will be unable to pay said notes as they mature and to pay its other indebtedness as aforesaid.*" Ex. C, p. 26.

We will have occasion to refer to this declaration of insolvency later on.

The same declaration of other indebtedness and inability to pay, is carried into the mortgage. Ex. D, pp. 27–29.

The mortgage thus executed on the 17th day of March was not recorded until the 1st day of May, forty-five days after its execution. The statute of Indiana requires mortgages to be recorded *within* forty-five days. It was kept from the

record until six days before the beginning of a suit for a Receiver by a creditor for over $13,000, one of those sundry creditors who could not be paid. Suits were brought by others of said creditors for the same purpose. The liabilities of said corporation on the day said mortgage was executed to its Directors was $277,415.00. Its total assets, appraised value, $206,088.00. *Actual value*, as ascertained by sales, collections, &c., about $150,000. But at appraised value, said corporation lacked more than $70,000.00 of enough to pay its liabilities at the date of said mortgage.

On the 17th of July, 1890, the Appellees filed their bill of complaint in this action in the United States Circuit Court for the District of Indiana. Rec., p. 1 to p. 10.

Appellants demurred to the bill of complaint. Rec., p. 10. The demurrer was overruled. No error is assigned upon this ruling.

Appellants then filed their answer. Rec., p. 11. To this answer Appellees filed exceptions and the exceptions were sustained, and upon this ruling the only question presented by this record arises. The alleged errors 2 and 3 [Rec., p. 55] will, of course, be disposed of by the ruling of the Court either way on the first assignment of error.

ARGUMENT.

The answer evades a direct traverse of the bill of complaint.

There is no allegation that the corporation was solvent at the time the Board of Directors sought to secure to themselves a preference.

The utmost that is alleged in this direction is that the corporation was a "going concern" and that they, the Directors, "fully believed the Sandford Fork and Tool Company to be solvent."

The answer seems to be based on two propositions, viz.:

1st—That in Indiana a corporation may prefer a creditor, and

2d—That in Indiana, a director of a corporation may deal with the corporation and take security from it for moneys advanced. Neither of which propositions will be controverted by Appellees, and all argument and authorities to support those propositions are not in point and do not meet the objections of Appellees to the answer. Appellants' counsel argued the exceptions, in the Court below, *upon the theory that there was no difference between the "preference" of a director, by an insolvent corporation, and the giving of security by a corporation to one of its directors who at the time advances money to said corporation.*. And they have presented the same theory here.

This is, we think, an error, and upon the determination of this question must turn the decision of this case.

Courts have always held that dealings between a corporation and its shareholders, and especially its directors, will be closely scrutinized and that there must be the utmost good faith, else such transaction will be invalid.

Directors of corporations must not take advantage of their superior knowledge of the affairs of their corporation, to obtain for themselves an advantage over those who have no means of knowing the condition of the corporation.

Appellees' first exception to the answer is that the matters pleaded are insufficient to constitute a defense. Rec., p. 32.

The allegations of the bill of complaint charge that Appellees were shareholders and, except Mayer, were and long had been the directors of said corporation. That prior to the 17th day of March, 1890, they had become "accommodation" endorsers of the paper, notes and bills of said corporation. And this allegation is not denied, but is admitted by the answer.

That as Directors they caused a mortgage to be executed to a trustee, for their use, for $75,000, on the entire plant of the corporation to indemnify themselves against loss upon said

"accommodation" endorsements. This is admitted.

That at the time said mortgage was executed said corporation was indebted in the sum of $275,000.00. This is not denied.

That said Directors concealed the fact of the execution of the mortgage and withheld it from registration until the time within which it could be lawfully put of record had elapsed, although they knew that Appellees and others were dealing with said company. This is substantially admitted and excused on the ground that the law permitted them to file the mortgage at any time within the 45 days.

That Appellees' claims were filed and allowed by the Receiver as just charges against the assets of said corporation.

That should the mortgage be permitted to be enforced, it will exhaust, or nearly so, all the assets of said concern, and that the other creditors (to the amount of over $200,000.00) will be defeated of their just rights as such creditors. And this allegation is not denied. But the theory of the answer is that these Directors had a legal right to do just that thing. And that presents the legal question of the case.

Can the directors of an insolvent corporation, by a mortgage of the company's property, prefer themselves to the exclusion of other creditors? Appellees contend that to permit such action upon the part of such directors would be against public policy and fraudulent as to other creditors, and the able Court below so held.

Howe, Brown & Co., et al *vs.* Sandford Fork and Tool Company, et al. 44 Fed. Rep. 231.

The able Circuit Judge, very justly and forcibly, we think, says, in the case cited:

"It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or *threatens* the enterprise, *shall be permitted to convert*

their powers of management and their intimate, and it may be, exclusive, knowledge of the corporate affairs into means of self protection to the harm of other creditors. THEY OUGHT NOT TO BE COMPETITORS IN A CONTEST OF WHICH THEY MUST BE THE JUDGES."

This last proposition seems to us so palpably right and just, and the reverse proposition, that the directors, with the exclusive knowledge of the condition of the corporation, may enter a race of diligence with those who are wholly ignorant of the truth, so dishonest and monstrous as to scarcely need argument, to the just mind. To adopt such a rule as Appellants insist upon, would open wide the doors for fraud.

Whilst it is true, as stated by this Court a number of times, "that a corporation is a distinct entity," yet the directors are the brains, nerves, muscles, will, heart of that entity. They are the corporation, in a sense the shareholders are the corporation. But in no such sense as the directors. The directors furnish the motive force for every act of the corporation entity. Their knowledge of the affairs of this artificial entity is its knowledge. But so clearly must this be true, that to say that this composite body may prefer itself as a creditor of itself, as an artificial entity, is as unreasonable as to say that an insolvent individual might mortgage his business establishment to himself to prefer himself against creditors of such business. Or that a partnership might prefer one of its members for money advanced beyond his share of capital stock to the exclusion of other creditors although he is liable for the whole indebtedness.

Although it has been frequently held by Courts that the property of a failing corporation is a trust fund in the hands of the directors for the benefit of creditors, the rule established by this Court in the late case of R. S. Hollins, et al *vs.* The Brierfield Coal and Iron Company, et al, is the true one. But the language of the Court, it seems to us, is most conclusive, *i. e.*, "The officers of a corporation act in a *fiduciary capacity*

in respect to its property in their hands and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto."

But Appellants' brief presents five points for discussion:

The first point is based upon an assumption of fact, not supported by the record, *i. e.*, that Appellants McKeen, et al. "accepted from said corporation the mortgage on March 17, 1890, and *at the time they paid out the sum of* $75,000.00 *upon the indebtedness of said corporation, relying upon said mortgage.*"

Both the complaint and answer disclose that the mortgage was given to secure an *antecedent* liability of said Appellants as "*accommodation endorsers.*" Not for money then paid out, and this makes a very wide difference. They say that "said mortgage was not executed and delivered * * * * and was not accepted by said Appellants, in contemplation, expectation or belief, of the insolvency of said corporation." If said corporation was *in fact* insolvent, the *Appellants* were chargeable with knowledge. Lowry Banking Co., et al *vs.* Empire Lumber Co., 17 S. E. Rep. (Ga.) 968. They had sole charge of the affairs of said corporation. It was their duty and they owed it to the public, with whom, as agents of said company, they were trading.

It is charged in the complaint that the corporation was insolvent, and it is not denied in the answer.

What is insolvency, in the eyes of the law? This Court, in Buchanan, et al *vs.* Gabriel L. Smith, assignee, 83 U. S., 277–310, has defined insolvency, in bankruptcy, thus: "Insolvency, in the sense of the Bankrupt Act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions."

In re Bininger, 7 Blatchf., 264.
Browner *vs.* Harbeck, 9 N. Y., 594.
Herrick *vs.* Borst, 4 Hill, 652.
Corliss *vs.* Jewett, 36 Minn., 364.

11 Amer. and Eng. Encyc. Law, 168.
Thompson *vs.* Thompson, 4 Cush., 127.
Lee *vs.* Kilburn, 3 Gray, 594.

Under the Bankrupt Act, the creditor seeking security for his debt was put upon enquiry, and the Court further says, "and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business." If this be true, how much more the directors should be charged with such notice, and a failure to know the facts would indicate utter inefficiency and unfitness for such a trust, or a willful disregard of their obligations.

"The question of a debtor's solvency depends, not upon the nominal value of his property, but upon whether enough can be realized from a sale of it to discharge his liabilities."

11 Amer. and Eng. Encyc. L., 172.
Churchhill *vs.* Wells, 7 Coldw., 364.

This latter rule is doubtless the correct one. These Appellants do not deny that the corporation was insolvent under this definition. It is not denied by them, that the debts at the date of the mortgage were $275,000.00; the assets, at appraised value, $205,000.00. (The debts were actually considerably more and the assets much less.) Of this large liability there was the mortgage for $50,000.00 on the "plant," one for $28,000.00 on stock, and Appellants' mortgage, $75,000.00, a total mortgage indebtedness of $153,000.00, leaving unsecured debts amounting to $122,000, and $53,000.00 unmortgaged property with which to pay them. And yet, in the face of these facts, Appellants protest and protest overmuch, that they took the mortgage securing themselves "believing in the utmost good faith" that the corporation was solvent! Somewhat the same state of facts are disclosed in this Record,

as appear in case of John S. Toof, et al *vs.* R. W. Martin, 80 U. S., 40–51.

Mr. Justice Field in that case says, speaking of a creditor taking conveyances with knowledge of insolvency of the creditor in violation of the Bankrupt Act, "The statute to defeat the conveyances does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. *It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary conditions of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business.*" It will be insisted that the rule under the Bankruptcy Act is not applicable. But we insist that Mr. Justice Field enunciated a reasonable rule, that should apply more strongly to directors than to outside creditors in ordinary cases of insolvency, and refutes the "much protesting" of these Appellants that they "acted in the utmost good faith, believing said corporation solvent."

But we are not left to surmise or conjecture on this subject. Exhibits C and D of Appellants' answer furnish evidence over their own signatures of *a knowledge of insolvency.* In Exhibit C, after setting forth the various notes on which Appellants, the directors and Mayer were endorsers, on page 26 of Record, occurs this significant bit of evidence: "Whereas this Company is indebted *in various other amounts to sundry persons and has been and will be unable to pay said notes as they mature and pay its other indebtedness as aforesaid.*"

This clear declaration of inability to pay the debts of said corporation is twice repeated in "Exhibit D," the mortgage which was made to secure Appellants, McKeen, et al. No where in any of these instruments does it appear that they had any belief that said corporation was solvent, and the

learned Circuit Judge was quite correct when he announced in deciding the case "that this mortgage was evidently made in anticipation of insolvency." It seems to us that the facts furnished by Appellees' answer refute absolutely any pretense of "believing in the utmost good faith that said corporation was solvent."

But let us pursue this question of "utmost good faith" a little further upon this record. The record does not disclose the number of stockholders in the corporation but it does disclose that there had been issued 3,000 shares. (Rec., 16) and that 2,250 shares were represented at the meeting of shareholders. The notice to the stockholders (Exhibit A., p. 24) does not inform them for what purpose it was proposed to mortgage the property of the company. The stockholders are reported to have adopted the following resolution: "Resolved, that the board of directors of this company be, and they are hereby authorized to cause to be executed a mortgage or mortgages upon all or any part of the property of this company, real or personal, or both, to *secure any new indebtedness or liability of this company or any indebtedness thereof that may exist at the time such mortgage or mortgages may be executed.*" Not a word about the "accommodation endorsements," and it is perfectly apparent that this resolution was not intended to disclose the purpose to secure a preference to the directors. Had the purpose been to act in the "utmost good faith in the belief that said corporation was solvent," why was it not stated *that the directors were authorized to secure the directors?* No reasonably prudent person reading that innocent little resolution would have suspected that it authorized a preference of the directors of the company for $75,000. But let us pursue it a little further. The directors meet. (Exhibit C., p. 25) and adopt a resolution, *not to secure new indebtedness*, but to mortgage the property to secure and indemnify themselves on notes which the directors and Mayer are endorsers, and specifically declare that said company

gaging of the property of the company for $75,000, to secure its board of directors, would be the best evidence, possible, to the creditors that the concern was in failing circumstances and would precipitate rather than postpone action by the other creditors.

Appellants alleged in their answer that they believed that, if the *cash cost* of the property of the corporation could be obtained that said corporation would be solvent. Answer, Rec. p. 17.

Yet they allege that the "*only capital stock of said corporation was* $150,000." Rec., p. 16. But they do not deny the allegations of the bill of complaint that, at that time, the liabilities of said concern, were $275,000, (really $277,000) and the answer shows that the total assets of said concern were appraised at $204,456.24. Rec., p. 20. Showing the concern to have been insolvent by over $70,000, even at "*cash cost*," but Appellants, as every business man knows, knew quite well that the "buildings, offices, shops, engines, boilers, machinery, fixtures and appurtenances," having been used for several years, were not worth "*cash cost*" nor anything like it.

The facts shown in the Appellant's answer and exhibits, together, with the undenied allegations of the bill of complaint shows conclusively that there could be no such thing as a belief in the "utmost good faith" that the concern was solvent at the date of their mortgage. They attempt in their answer to evade the full force of their relations to the Sandford Fork and Tool Company. They say on page 23 of Record, that "respondents were informed by the managers of said * * * corporation * * * that it would be unable to pay, &c." But the Statute of Indiana provided that "*the business of such company shall be managed* by * * * *directors who shall be stockholders.*" Rev. Stat. Ind., 1881, Sect. 3854. There is no law for the delegation of this management to others. "The directors of a manufacturing company are officers."

Goff *vs.* Theiss, 33 Ind. 307.

And the statute of Indiana required these officers to publish "within twenty days from the first day of January * * * a report * * * which shall state the amount of capital, the amount of assesments made and actually paid in, and the amount of existing debts; *which report shall be signed by the president and a majority of the directors, and shall be verified by the oaths of the president and such directors and secretary.*"

Rev. Stat. Sec. 3863.

This Statute put upon all these respondents, McKeen, Hulman, Nixon, Minshall and Kidder, who constituted the board of directors, the burden of *knowing the condition of the concern and making oath to their knowledge.* Kidder was president; Nixon, secretary, and all the others directors, and officers within the meaning of this statute. Will they be heard to say that *they were not the managers of this concern and that they were ignorant of the condition of it?* This report was required to be made within twenty days after January first, and on March first thereafter they call a meeting of shareholders to procure the execution of the mortgage. We are not advised by the answer how much of the $277,000.00 of liabilities of the Sandford Fork and Tool Company existed prior to January first. But we may well assume in the absence of a showing to the contrary that most, if not all of it did exist before January first. It was then the legal duty of these Appellants, made so by the statute under which the corporation existed, to *know the truth and in contemplation of law what it was their legal duty to know they did know.*

Trustees may not shirk a legal duty and then plead ignorance. And Appellants could not in legal contemplation accept the mortgage, "in perfect good faith, and in the belief that said corporation was solvent."

The third point in addition to the matters relied upon in

the first and second counts on the corporation being a "going concern," and much stress is laid upon this proposition. It certainly can make no difference, as between the managers of an insolvent concern, and the other creditors, as to the managers' right to prefer themselves over the other creditors, that it was a "going concern." In fact, its being a "going concern" enabled the managers to attempt to obtain the advantage over other creditors. Very soon after it ceased to be a "going concern" it would be known to the world that it was insolvent, but before suspension, the managers would be the only persons who could know that it was insolvent. Yet, under the Bankruptcy Act, this Court says: "When the condition of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, is reasonable cause to believe him to be insolvent. *Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe.*"

Toof *vs.* Martin, 80 U. S., 481.
Buchanan *vs.* Smith, 83 U. S., 280.
Wager *vs.* Hall, 83 U. S., 504.
Merch.'s Nat. Bank *vs.* Cook, 95 U. S., 342–346.

If this was true under the Bankruptcy Act, as to creditors, how much more force should it have against the debtor, and in this case the "board of directors" is both creditor and debtor. But these directors could not very well avoid actual knowledge that the liabilities of the Sandford Fork and Tool Company were over $275,000, and that its assets were not within $100,000 of that sum, unless they shut their eyes and ears and turned their backs upon the books of that "going concern."

The fourth "point" presented by Appellants is that they were really very magnanimous and did not "grab all that was in sight." They say that they left $88,000, entirely unincumbered. But they have not the frankness to tell the

Court that there then existed $122,000 of debts wholly unsecured, and that $28,000, worth of the personal property was covered by chattel mortgage, leaving $60,000 of the unincumbered property, or less than fifty per cent. of the unsecured liabilities, and they fail to tell the Court what was well known to them when they wrote the answer and brief, that the $88,000 had shrunken at the sale by the Receiver about fifty per cent. Yet they wish to be understood as being generous to their creditors.

But they say that they "*practically obligated themselves to protect the corporation and its creditors against the first mortgage.*" But it appears that they did not protect either the corporation or creditors. The closing sentence of that point, however, discloses that it was not the corporation nor creditors who were to be protected, but to save their own security they must "pay off said first mortgage *or forego all security under their second mortgage!*"

Finally, Appellants in their fifth point say that they should be protected "because every dollar of the $75,000 for the payment of which Appellants McKeen, Hulman, Minshall, Kidder and Mayer originally became sureties for the Sandford Fork and Tool Company, and which Appellants finally paid * * * went directly into the property and assets of said corporation." This is doubtless true, but so did the $202,000 of money obtained from other creditors, among them the Appellees. And such other creditors were not shareholders, promoters, and managers of said corporation, and had not the means of knowing that said corporation was insolvent, and they, no doubt, credited said corporation "*in perfect good faith, believing that said corporation owned property and assets sufficient, and more than sufficient, to pay all of its liabilities.*" Had they known what Appellants knew, they would not have put their goods and money into it, nor trusted it, even upon the credit of such high *financial sponsors* as Messrs. McKeen, Hulman, et al.

They renew and repeat their asseverations that all that

they did was in "utmost good faith," the most "perfect good faith" to such an extent as to raise a doubt of their "good faith."

It all comes to this, finally, that being the managers, the officers, and largest shareholders, of a corporation which was found to be in a failing condition, they sought to secure to themselves a preference over other creditors. And it is for this Court to say now, whether the learned Circuit Judge was correct when he said that upon these pleadings the mortgage was executed in contemplation of insolvency, to secure a preference to themselves, by these directors and because of their relations to said corporation and the creditors thereof, their action was against public policy and should not be tolerated in equity, "and that the exceptions to the answer were well taken. And said answer did not state facts sufficient to constitute a defense to complainants' bill or any part thereof."

This is not a case of a shareholder or director advancing money or credit for a corporation and taking security. It presents but the single and simple question, can the managers, directors and officers of a failing corporation secure to themselves a "preference" over other creditors?

Suppose at a time when the Sandford Fork and Tool Company was solvent, Messrs. McKeen, et al. being directors had advanced money to it and taken its notes; could they afterwards, when they knew it must fail, execute to themselves a mortgage on the principal property of the company to secure to them the payment of those notes? If they could not, then they could not legally do what is undertaken in this case, for it can make no difference that instead of loaning the money themselves, they induced others to do so on their endorsements. If the controling, managing officers of a corporation may thus prefer themselves, it would certainly be a blow to the credit of corporations, for no man usually prudent would loan money or extend credit to a corporation with the knowledge that the officers and managers, know-

ing the condition of the concern, may lawfully seize upon all its assets and secure themselves against loss, in case of failure, at the expense of the other creditors, who would have no opportunity to secure themselves. It would be quite as equitable and just to say that the shareholders might secure themselves against loss of the money paid into capital stock. We feel sure that the reasoning of Judge Woods upon this proposition is conclusive and we beg leave to refer to his opinion, which is made a part of this brief. But how stand the authorities upon this question of the right of directors, managers and officers to prefer themselves?

There have been numerous decisions upon this question in the courts of last resort in the states of the Union, and of all these so far as we are able to discover none have given countenance to so unequitable a doctrine. But decisions in three states are *cited* as supporting the doctrine that a failing corporation *may prefer* its directors or officers. One of these is Flint &c. Ry. Co. *vs.* Dewey, 14 Mich. 477.

That case is in no particular like the case at bar. It was not a case of attempted preference, but was a case of the president of a company becoming interested in a contract for construction of the company's railway, by which he got hold of bonds of the company. The Court of Michigan declares the transaction fraudulent, and expresses itself very vigorously against the proposition that managing officers of a corporation may secure to themselves advantages over creditors. It uses this strong but just language which is applicable to this case: "If such contracts were held valid *until shown fraudulent and corrupt*, the result, as a general rule, would be that they must be enforced *in spite of fraud and corruption*."

Appellants say that the bill of complaint does not charge fraud. We do not understand that it is essential to a charge of fraud that the epithet should be used. If the facts stated work a fraud it can make no difference whether the party intended fraud or not. The result is what Courts have to do with, not individual intentions. Garrett *vs.* Burlington Plow

Co., et al, 29 N. W. Rep., 395, is another case cited in support of the contention of Appellants, and it may be conceded that it *seems* to. But the Court says: "It is true that the Courts will scan with care, *and even with suspicion, such transactions, and demand that they be accompanied by the utmost good faith.*" But a proposition stated by the Michigan Court in the case just quoted seems to us the better rule: "The principle of law applicable to such contracts renders it immaterial * * * whether there has been any fraud in act, or any injury to the company." * * * "The law will not permit the agent to place himself in a situation in which he may be tempted by his own private interests." This should be the law as applicable to the dealings of managing officers dealing with the public.

Wilkinson, et al *vs.* Bauerle, et al, 7 Atlantic Rep. (N. J.) 514, is also *cited*, but the facts there are that a corporation being in failing circumstances, sold its property to one of its directors for a sum considerably larger than its value, and with the money paid by the director, the corporation preferred and paid off certain of its creditors who were neither directors, officers or shareholders in the corporation. The N. J. Court of Appeals holds the transaction valid as to the director, who was not a creditor and gained no advantage over creditors. And we suppose that had Appellants McKeen, et al, bought the property of the Sandford Fork and Tool Company for a sum considerably larger than it could have been sold for to any one else, and had the company used the money in payment of its debts, there could be no complaint. But even on so manifestly fair and just a transaction as that between the parties in the case cited, the N. J. Court says: "It devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property."

Appellants have cited, in their brief, forty-one cases which

they say, "in our (their) opinion, fully support, and conclusively establish, the above propositions (*i. e.*, their points) and reasons stated in support thereof." It would needlessly extend this brief to take up and discuss each of these cases. It will suffice to take examples as illustrating all cited.

The first case is one decided by this Court: Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587, 588, 589. It takes but a cursory glance to discover that this case does not support a single proposition in controversy here. It is decided there that a director may loan money to a corporation and take security therefor and between such creditor and the corporation the contract will be valid. There is no question of preference as against creditors. But the Court, by Mr. Justice Miller, says "that a director of a joint stock corporation occupies one of *those fiduciary relations* where his dealings with the subject-matter of his trust, or agency, and with the beneficiary or *party whose interest is confided to his care, is viewed with jealousy by the Courts, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this Court and others.*"

Koehler *vs.* Iron Co., 2 Black, 715.
Drury *vs.* Cross (74 U. S.), 7 Wall., 299.
R. R. Co. *vs.* Maquay, 25 Beav., 586.
Cumberland Co. *vs.* Sherman, 30 Barb., 553.
Hoffman, &c. Co. *vs.* Cumberland Co., 16 Md., 456.

The directors of a corporation, in a sense, stand in a fiduciary capacity toward creditors, and to their honesty, integrity, skill, and business ability must the creditor look for assurances of the safety of the company's credit. To secure himself at the expense of the creditors is a violation of that trust, a breach of that fiduciary relation.

Omaha Hotel Co. *vs.* Wade, 97 U. S. 13–24, was an action to foreclose a mortgage executed by the corporation to secure bonded indebtedness. The corporation defended on the ground that part of its directors became holders of some of

the bonds. No question of preference is involved, but the right of directors to recover, in an action against the corporation, for money advanced to it and secured at the time by mortgage. No question of insolvency or outside creditors.

Fitzgerald &c. Co. *vs.* Fitzgerald, 137 U. S. 98–113, is also an action by a stockholder against the corporation for money loaned. No question of preference, insolvency or rights of creditors involved. The court simply holding that a stockholder may recover from the corporation, money advanced by him.

Leavenworth County &c. *vs.* Chicago &c. R. R. Co., 134, U. S. 688–710, is an action between several corporations. There is no question of insolvency or creditors' rights. But the rights of the stockholders as against a mortgage. It is held that the plaintiff should have set up the defense of fraud in the foreclosure, and not in a subsequent action. But the case throws no light on the right of a board of directors to prefer themselves as creditors of an insolvent corporation.

But when Appellants *cite* Washburn, Ex'r. of Richardson *vs.* Green et al., 133 U. S. 30–50, as supporting their contention, we are amazed indeed. Mr. Justice Lamar delivered the opinion of the Court, using in the opinion the following language: "Richardsons' relation to the subject matter of this controversy was threefold: (1) that of a creditor of an insolvent corporation claiming for his debt priority of payment over those of all other creditors, out of the fund arising from a foreclosure sale of the mortgaged property; (2) that of a director and officer of that corporation at the time his debt against it was created; and (3) that of the largest shareholder of its capital stock. Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust,

but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, *with a view to the benefit of the company* as WELL AS OF ITS CREDITORS, AND NOT SOLELY WITH A VIEW TO HIS OWN BENEFIT, THEY REFUSE TO LEND THEIR AID TO ITS ENFORCEMENT."

Can there be any doubt in the light of the facts pleaded in this case, that Appellants acted *"solely with a view to their own benefit?"* No one else, not even the corporation, had any benefit from this mortgage, but, if it is allowed to stand, a serious injury results to the unsecured creditors. Appellees have never asserted, nor do they now, that Appellants were not entitled to be treated as creditors, and to have their *pro rata* share with other unsecured creditors, of the money actually paid out by them on their endorsements.

But that the mortgage by which they sought to secure to themselves payment of their claims in full, at the expense of other creditors, is void.—*That they have no right to seek their own benefit solely.*

Appellants quote from Gould *vs.* L. R. M. R. & T. Ry. Co., 52 Fed. Rep., 684–5–6. The language quoted sustains our contention. The Court says: "It, (the money was) was not loaned or advanced for the purpose of obtaining any advantage over the corporation or its other stockholders or creditors, but to conserve the best interests of *all persons interested in the property.*" But how could the other creditors of the Sandford Fork and Tool Company be benefited by a mortgage preferring the board of directors for past debts? It not only did not conserve the *"best interests of all persons interested in the property"* but if held valid, destroys all possibility of the insolvent corporation ever paying its $122,000 of unsecured debts, or any considerable portion thereof.

We might pursue this investigation indefinitely, but it would not be profitable. We now turn to what we conceive to be the authorities which are clearly apposite to the facts

of this case, *i. e., the attempt, by the entire board of directors of a failing corporation to prefer themselves, as creditors, to the serious injury of other creditors.*

"There has been difference of opinion in the courts, but *the weight of authority clearly and wisely holds that an insolvent corporation cannot pay a debt due to a director in preference to debts due others either by turning out property to him or by giving him a mortgage on corporate assets.*"

Cook on Stock and Stockholders. Sec. 661.
Beach *vs.* Miller 14 N. E. Rep. 698. (Ill. 1888.)
Gaslight &c. Co. *vs.* Terrell, L. R. 10 Eq. 168. (1870.)
Haywood *vs.* Lincoln Lumber Co. 64 Wis. 639.

"Where an insolvent corporation prefers a director it is unlawful."

Adams *vs.* Kehlor &c. Co. 36. Fed. Rep. 212. (1888)
35 Fed. Rep. 433.

"A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors."

Adams *vs.* Crosse, &c. Ry. Co. 5 Ry. and Corp. L. J. 18. (Ill. 1888.)

"A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The director will be allowed to come in the same as other creditors."

Stratton *vs.* Allen, 16 N. J. Eq. 222. (1863)
Lippincott *vs.* Shaw Car. Co. 25 Fed. Rep. 577.

"A mortgage by an insolvent corporation to a director will be upheld to the extent the director *at the time of the mortgage advanced funds to pay its debts, but not as regards antecedent debts due the director.*"

Corbett *vs.* Woodward, 5 Sawyer, 403 (at 416).
Williams *vs.* Patrons of Husbandry, 5 West. Rep., 105 (Mo., 1886).
White, &c. Co. *vs.* Pettes &c. Co., 30 Fed. Rep., 864.

Lippincott *vs.* Shaw &c. Co., *supra.*
Stout *vs.* Yaeger, 13 Fed. Rep., 802.

In New York and Pennsylvania such preferences are prohibited by statute.

Paulding *vs.* Jerome, 94 N. Y., 334; 90 Pa., st. 69.

"A director cannot vote on a renewal of a note to himself. The purchaser of such a note is not protected."

Smith *vs.* Los Angeles &c. Assoc., 20 Pac. Rep., 677 (Cal., 1889).

The Supreme Court of Georgia has given the question involved a very full and elaborate discussion in Lowry Banking Co. *vs.* Empire Lumber Co., 17 S. E. Rep., 969 (Ga., 1893).

We take the liberty of quoting from the case freely, illustrating our position so clearly as it does.

The Court, by Lumpkin, J., says: "A corporation can do nothing, except through the individuals who are charged with the management and control of its affairs. In the very nature of things, the directors are, of all persons, those who ought to be aware of *everything* material to a proper discharge by the corporation of its duties and obligations. To permit ignorance in these officials of its affairs would certainly be going to the extreme limit of legal indulgence. *Surely, they ought to know its condition with reference to solvency or insolvency. This duty is imperative and therefore, for all purposes, they are to be dealt with and treated as having absolute knowledge of what the corporation owns and what it owes, whenever a mortgage upon its property is executed with their consent, or by their authority.*

"*To state this proposition is to argue it, and we have no doubt it will be accepted as correct without question.*"

This states a proposition that is only common sense and common honesty.

But the Supreme Court of Georgia, in discussing the facts of the case, says further: "No additional credit was extended or money advanced to the lumber company because

of the execution of these mortgages. The company had already incurred the several debts represented by the papers referred to above, and had received the benefit of the money raised thereupon, and received nothing more because of executing the mortgages."

So here the Sandford Fork and Tool Company received nothing more because of executing the martgage to Appellants. "Nor had the company made any promise or agreement at or prior to the time when the liabilities were incurred to give the indemnity for which the mortgages were afterwards executed."

No such fact exists here.

"It was therefore a plain, naked effort by an insolvent corporation to prefer and secure members of its own body against impending loss about to be occasioned by reason of their suretyship for the corporation."

So here is a plain, naked effort by the entire board of directors of an insolvent corporation to prefer themselves against impending loss. In no case that we have found has there been an attempt by the entire board of directors to prefer every member of it, all voting a direct benefit to themselves.

Upon the facts stated, the Georgia Supreme Court says: "*In our opinion the law forbids such action by a corporation, under the facts and circumstances above set forth.*"

In Green's Brice's Ultra Vires, 477, it is said "that directors come within the designation of persons filling a fiduciary relationship." And in a note on page 479 it is said "the directors of an insolvent corporation, while it is under their management, hold the position of trustees of its assets for the benefit of its creditors. *If they are themselves creditors, they are precluded by their trust from securing to themselves, by their official action, any preference or advantage over other creditors.*"

Bradley *vs.* Farwell, 1 Holmes, 133.

Upon this same general question, the following authorities are in point, supporting the proposition that directors cannot prefer themselves. See

Field's Ultra Vires, citing Abbott *vs.* Rubber Co., 33 Barb., 578.

Wait on Insolvent Corporations, 2 Mor. Priv. Corp., Sec. 787.

In Adams *vs.* Mill. Co., 35 Fed. Rep., 433.

Thayer, J., says: "The case seems to fall fairly *within the rule which prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts in the payment of which they have a personal interest.*"

The Supreme Court of Georgia, in the case just *cited*, also *cite* with approval, the language of Judge Woods in this case, *i. e.*, "While a corporation while still a 'going concern,' is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large amount, is invalid, as to the general creditor and *that* though the mortgage was procured by the directors without any actual fraudulent intent." The corporation in Corey *vs.* Wadsworth, *supra*, was a "going concern" at the time of the alleged preferences, but soon after made an assignment for the benefit of creditors.

Appellants have seen fit to place great stress upon the fact that the Sandford Fork and Tool Company was a "going concern" at the time their mortgage was executed. It seems to us that this could make no difference, if the corporation was actually insolvent. That was a fact they were bound to know and the answer does not deny that it *was in fact insolvent*.

In Consolidated Tank Line Co. *vs.* Kansas City Varnish Co., 45 Fed. Rep. 7.

The directors sought to prefer themselves, under similar conditions, and the court, "held in a proceeding by unsecured creditors to set aside, that, being a security for debts upon which the directors were themselves liable as indorsers,

it was, in effect, a preference to themselves and fraudulent and void."

This doctrine is fully and ably discussed in an article in 23. Amer. Law Review, No. 6, p. 1003, and the conclusions reached by the Georgia Court are maintained and many authorities *cited* in support of it.

The Supreme Court of Georgia, Corey *vs.* Wadsworth, *supra*, in conclusion says: "The question we have been considering is one of grave and growing importance. * * * * * * * * and we have therefore felt it our duty to collate the authorities. It will be seen that the modern authorities, almost without exception, utter the same strong condemnatory language of any and all attempts by directors of an insolvent corporation to have themselves indemnified and preferred over the other creditors of the company. The assets are, in a sense, a trust fund in their hands for the payment of the corporation's debts, and it is both their moral and legal duty to maintain perfect equality in their administration and disbursement, *at least to the extent that they cannot prefer themselves.* * * * Notice is taken of the superior knowledge they (the directors) necessarily have and the great advantage this would and does give them in a race of diligence. But the principle extends further. In a conveyance by which they attempt to pay or secure themselves, that necessary element of all valid contracts—opposing interest in the seller and buyer—is wanting. *They are both seller and buyer. Such transactions by a trustee are always voidable on the ground of public policy.*"

In the case at bar it was sought to avoid the predicament thus described, the directors call together the shareholders and seek to thrust themselves, stockholders, between themselves as creditors, and themselves as directors of the corporation. But it seems to us, from what we have already shown of the transaction, that they have utterly failed in this subterfuge, as it no where appears that the stockholders were made aware of the directors' purpose to prefer themselves

and it appears that the stockholders did not vote upon or order a preference to the directors by mortgage, or in any other manner. So far as the record of the stockholders discloses the facts, the mortgage in controversy was wholly unauthorized.

Again, to hold that this mortgage is valid as against creditors because it was, as is alleged a "going concern," would be to defeat the application of the principles already considered. The directors are on the "inside" of the corporation, they know its condition. Should it be once established as the law of such cases, that so long as the corporation continued to do business it could prefer its officers without reference to its solvency, then directors who are creditors will always manage to keep their corporation a "going concern" until they safely secure themselves against the coming and inevitable failure, and the outside creditor will be ruled out of the race of diligence to secure himself. The directors of a corporation, in debt more than a $125,000 beyond its capital stock, and more than $70,000 beyond the utmost value of all its assets, must know, beyond peradventure, that failure and suspension is inevitable and that nothing short of a miracle can save it.

Any step taken to secure themselves under such conditions must be taken in *anticipation of an early suspension.* The general creditors know nothing of such conditions and the directors know that if they wait until after the crash, they must then share with the other creditors and it is too late to prefer themselves. If, however, a "going concern" is embarrassed and the directors knowing its condition, believe that they can save it, by advancing to it money sufficient to relieve its embarrassment, and do advance the money and take security therefor, they then would be promoting the best interests of the concern, and its creditors, but the directors of the Sandford Fork and Tool Company knowing its indebtedness and the pressing nature of it, attempted *only to secure themselves from loss by the inevitable failure*, and the fact

derstood as deciding that a corporation that is financially embarrassed will be deprived of the right to deal with its corporate property in a legitimate and proper way; but we do say that when the corporation is hopelessly insolvent * * * and these facts are known to its officers and directors, then all of the assets of the corporation become a trust fund in the hands of the directors to be administered by them as trustees, or agents, *for the equal benefit of all the creditors of the concern, and any attempted preference in favor of the directors themselves * * * will not be upheld.*"

Williams *vs.* Jackson Co. Patrons, 23 Mo. App., 135.
Roan *vs.* Winn, 93 Mo., 503.
Foster *vs.* Mill. Co., 92 Mo., 79.

The same reasons for denying an insolvent corporation, so circumstanced, power to give preferences, are announced with clearness and force, in the following cases:

Olney *vs.* Land Co., 16 R. I., 597.
Haywood *vs.* Lumber Co., 64 Wis., 639.
Turnbull *vs.* Lumber Co., 55 Mich., 387.

It must, in equity, require something more of a corporation than merely keeping its doors open, or running its machinery, to justify directors in dealing with the property of the company for their own benefit. There must, at least, be a reasonable probability that it will be able to pay all its liabilities. It must not, in the language of this Court, be "so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors."

Mellin *vs.* The Motive M. Iron Works, et al. 131 U. S., 352–371.

This case does not, as we have already attempted to show, present the simple question of the right of a failing corporation to prefer creditors. The real and only question is, have those who stand in a fiduciary relation to the property of the company a right to deal with that property in a manner to secure to themselves beneficial advantages? Whilst it may be conceded that the Courts have used the words "trust"

and "trustee" in expressing the relations of directors to the assets of the corporation "in a wider and more general sense than could be maintained upon general principles of equity jurisprudence," yet we think it quite clear that this Court and all other Courts hold that the relation is a fiduciary one, and that the directors are held to all the duties and obligations of a fiduciary, first to the stockholders, and in case of insolvency to the creditors. And it is and always has been the law that those acting in a fiduciary capacity must not serve their own selfish ends through that capacity. Appellees do not complain of the acts of the Appellants becoming "accommodation endorsers" or even sureties, as they put it, on the paper of the Sandford Fork and Tool Company on the 18th of September, 1889, nor that as between them and the corporation, they could not enforce re-payment to them of any sum that they might have been compelled to pay out on that endorsement, *provided that the transaction was bona fide*. They took no security then, nor is it pretended that there was *at that time* any agreement between said directors and the corporation that they should be secured over other creditors. What Appellees complain of is, *that nearly six months thereafter*, and when they knew by reason of their fiduciary relations to said corporation that its liabilities exceeded its assets by more than $100,000.00, they sought to take advantage of their superior knowledge, obtained by virtue of such relation to the affairs of the company, to secure themselves from loss at the expense of the other creditors, many of whom, doubtless, had dealt with the corporation in the meantime, relying upon the property of the corporation, and the "good faith" and integrity of the directors as security for the payment of their debts.

This Court, in Handley *vs.* Stutz, 139 U. S., 417, at 438, holds that a stockholder "was clearly not entitled to set off against the claim of the creditors his own claim against the corporation."

Sawyer *vs.* Hoag, 84 U. S., 610–624.

In the latter case Mr. Justice Miller says: "Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the Appellant claims to have paid his subscription? Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, *is a trust fund* for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such principle, that it is modern, for the occasion for it could not sooner have arisen. The principle is fully asserted in two recent cases in this court, namely, *Burke vs. Smith ante* 361, and in *New Albany vs. Burke*, 11 Wall. 96."

Now suppose Messrs. McKeen et al. were sued for unpaid subscriptions of stock and sought to set off the debts attempted to be secured by this mortgage, how would the case stand? The Court would be bound by the above rule to hold that Appellants must pay in full, and share with the general creditors on their claims. What difference in principle can there be?

But this court has passed upon this very question, we think, conclusively. JACOB KOEHLER ET AL *vs.* THE BLACK RIVER IRON CO.; WILLIAM HUBBY ET AL., 67 U. S. (2 Black), 715–721.

Mr. Justice DAVIS, for the court, says: "The company was evidently embarrassed and in great need of money, and as the necessity was urgent and pressing, the directors were instructed to obtain as large a loan as they could, and to secure it by a mortgage on the lands and works. * * * *No authority was given to them to secure pre-existing indebtedness, and certainly none to secure themselves in preference to other creditors.* Did these directors, as guardians of an important trust committed to their care, endeavor in good faith to ac-

complish the objects which their principals so much desired?" They did just what the Appellants, McKeen et al did, secured, not the *whole board* as was done in this case, but two of the directors. The court thus comments upon the action of that recreant board: "Instead of honestly endeavoring to effect a loan of money advantageously for the benefit of the corporation, these directors, in violation of their duty, and in *betrayal of their trust, secured their own debts to the injury of the stockholders and creditors.* Directors cannot thus deal with the important interests entrusted to their management. *They hold a place of trust,* and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation.

In executing this mortgage and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees.

"The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust* and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."

Angel & Ames, Corp. Ed. 1861 Sec., 312.

The Charitable Corporation *vs.* Sutton, 2 Atk., 404.

Robinson *vs.* Smith, 3 Paige, 220.

Hodges *vs.* New Eng. Screw Co., 1 R. I., 321.

York and N. M. Ry. Co. *vs.* Hudson, 19 Eng. L. and E., 361.

The Board of Commrs. of Tippecanoe County *vs.* Reynolds, 44 Ind. 509 at 520.

Twin Lick Oil Co. vs. Marbury, 91 *U. S.*, 587–594.

Directors occupy a fiduciary position towards both the stockholders *and creditors* of the corporations.

Dury *vs.* Crosse, 74 U. S., 302.
R. R. Co. *vs.* Howard, 74 U. S. 392.
Jackson *vs.* Ludeling, 88 U. S., 616.
Wood *vs.* Dummer, 3 Mason, 309.
Heath *vs.* E. Ry. Co., 8 Blatchf., 347.
Goodin *vs.* Whitewater Can. Co., 18 Ohio, st. 169.
Port *vs.* Russell, 36 Ind., 60.
Messina *vs.* Goldthwaite, 34 Texas, 135.

But we might cite authorities to support this proposition almost without number.

How stands this case in the light of these decisions? If, as *Justice* DAVIS says, "directors may not secure their own debts to the injury of the stockholders *and creditors*," then this mortgage must fall. Compare the facts set out in the answer of Appellants with the facts in Koehler *vs.* Black River Iron Co. The Sandford Fork and Tool Company was in pressing need of relief; the stockholders are called together, evidently to meet the emergency. They pass a resolution authorizing the board of directors *"to secure any new indebtedness or liability* of the company or any indebtedness thereof, that may exist at the time the mortgage may be executed, or to sell any property that the directors may deem for *the best interest of the company*.

Rec., Exhibit B, 24–25:

Not one word here, to indicate that the stockholders intended to give the directors power to do a thing so clearly *against the best interests of the company*. No authority is given to secure pre-existing debts, much less to secure a preference to the directors. No better device could have been invented to force the corporation to suspend than to mortgage its entire plant to *its own directors*. Such an act, when known, would destroy its credit and leave it helpless to go on, and leave nothing for it to do but to go into liquidation, and that result followed quickly upon the registration of the mortgage.

Again, if the directors hold a fiduciary relation to the cred-

itors as well as to the stockholders, such a transaction cannot be upheld. One holding a fiduciary relation to another may not do any act that will result in benefit to himself and injury to the other party in relation to the subject-matter of that relation. This proposition is certainly settled beyond question. Then this mortgage is very greatly to the injury of the Appellees and other creditors, if upheld, as it deprives them of the right to share in $75,000.00 of the assets of the Sandford Fork and Tool Company. To hold this mortgage invalid is but to put the directors upon an equality with other creditors. And of this they can have no reasonable ground for complaint, they were the promoters, stockholders and responsible managers of the Sandford Fork and Tool Company. If it succeeded and made large profits, they got the benefits. The creditors got none of them. If it failed, it is owing to their management of its affairs and they should not be heard to ask that the other creditors should pay them in full and lose their own debts. The creditors had nothing to do with the management of the affairs of the corporation, they had no means of anticipating a failure and securing themselves, whilst the directors, by reason of their *fiduciary relation*, possessed all these advantages.

Appellee's position does not conflict in any particular with the decisions of this and other courts, holding that corporations may prefer creditors as individuals may.

But counsel for appellant persistently evade the difference between the preference of an ordinary creditor and the preference by those standing in a *fiduciary* relation to the matter, and they persist in the proposition that even *fiduciaries* may prefer themselves until an absolute suspension. If that were the law, boards of directors would assume none of the risks of extending credit to their corporations that other creditor are forced to assume. Being in a position to constantly know the condition of the corporation, they have only, at their leisure, to secure themselves, take the assets to them-

selves and leave the other creditors to suffer the consequences of their folly.

As to the plea of ignorance of insolvency upon the part of those directors, we call attention again to the case of Lowry Banking Co. *vs.* Empire Lumber Co., *supra*, where ignorance upon the part of the mortgagee was interposed. The Court says: "We think it entirely immaterial whether the insolvency of the corporation was known to Heath, (the mortgagee,) or not; the principle of law which we have sought to establish being that the mortgage * * was invalid *because it also benefited the directors* of the corporation. *This being the only reason, so far as Heath* is concerned, *for invalidating the mortgage*, his ignorance of the insolvency could not vary the operation of the principle; it not appearing that any money or other thing of value was obtained by the corporation, or anything added to its resources, by reason of the execution of the mortgage to him, and as a consideration for the same. In other words, *no possible benefit could result to other creditors as a consequence of the making of this mortgage*, and the company's assets at that time, being trust funds in the hands of the directors for the benefit of *all its creditors, these* directors could not do an act, unlawful in itself, which would be valid, *even in favor of an innocent party, simply because he was ignorant of the existence of the facts which* made the act illegal. It was not ignorance that misled him, or caused him to do anything to his own injury. His liability was already irrevocably fixed and the failure of the security by which he hoped to obtain his indemnity is simply his misfortune. * * * *It would certainly be a curious doctrine which would make a void mortgage valid simply because the mortgagee believed it was valid* when he took it."

Appellants McKeen et al., as we have seen, cannot successfully plead ignorance. Their position prohibits it. The Sandford Fork and Tool Company obtained no money or thing of value by reason of the mortgage, *and no possible ben-*

efit could result to the other creditors by reason of the mortgage.

The Appellants stand in a much less favorable position to invoke the favor of a court of equity, than did Heath in the case *cited*. He could "in the utmost good faith" plead ignorance of the facts, and they cannot be heard to say that they, the managing officers were not in full possession of all the facts.

Appellants *cite* a number of decisions by the Supreme Court of Indiana, but none of them presents the question involved in this cause. On the contrary, that Court holds that whilst a debtor may prefer a creditor, yet such preference must not be given as one of the preliminary steps to an assignment. And the Supreme Court of Indiana has never yet decided that one standing in the relation of a *fiduciary* could in "wholly good faith" or the "utmost good faith," so deal with the property in his hands as to secure to himself an advantage over others interested in the same fund. It is utterly impossible that there should be "good faith" in a *fiduciary* securing a selfish advantage to himself.

"A trustee, no mattter from whom he derives his authority, *cannot purchase the trust estate so as to make a profit to himself.*"

Breckenridge *vs.* Holland, 2 Blkf., 377.
Huff *vs.* Earl, 3 Ind., 306.
Rice *vs.* Cleghorn, 21 Ind., 80.
Lane *vs.* Taylor, 40 Ind., 495.

"The pretended sale to Beckwith was a fraudulent pretext, which was resorted to for the purpose of evading *the settled rules of law and equity, that no person can unite the two opposite characters of buyer and seller, and that a person acting in a fiduciary capacity cannot make a profit to himself out of the means or property of those for whom he acts. No person can be permitted to purchase an interest in property, where he has a duty to perform, which is inconsistent with the character of a purchaser.* The principle is well set forth by the Supreme Court of the

United States in the case of *Michoud vs.* Girod, 4 How., 503."

Lane et al *vs.* Taylor et al, *supra*.

This is the law in Indiana, and these directors attempted to unite in themselves the *opposite characters of debtor and creditor, mortgagor and mortgagee*. They in their fiduciary capacity owed a duty, first to the Sandford Fork and Tool Co. whilst it was solvent, to do nothing that would secure to them a personal profit from the management of its affairs over other stockholders, and second, a still higher duty to the creditors, when it became apparent that the corporation was insolvent, to prevent any advantage being taken by which there should not be a fair and equal distribution of the property of the corporation among all its creditors, and that they should not use that relation, as directors, to gain an advantage to themselves.

The reasoning of this court in the case of Michoud et al, *vs.* Girod et al, *supra*, illustrates the subject of this controversy forcibly. "*The general rule stands upon the great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest* and integrity. * * * The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him."

As we have said, there is not the slightest conflict between our position and the right of a debtor to in good faith prefer a creditor. The courts hold that this may be done solely upon the ground that a man may always pay an honest debt. And he may choose between honest debts, which he will pay. But directors are the debtors and it places them in a position to "excite a conflict between self-interest and integrity," to permit directors to choose between debts due to themselves and those due to others, *more deserving of preference, because they have done nothing and been in no position either to bring*

about or avert the necessity of such choice. The Supreme Court of Indiana has never decided that the entire board of directors of a private corporation, may take advantage of their superior and exclusive knowledge as *fiduciary* agents to secure to themselves, advantages over other creditors of the corporation.

This case upon the facts set forth in the pleadings and exhibits stands thus: The Sandford Fork and Tool Company on the 1st day of March, 1890, was indebted in the total sum of more than $275,000
It had assets, at appraised value 204,445
Leaving liabilities over assets 70,555
There was already a mortgage on the "plant" for . $50,000
There was a mortgage upon personalty 28,000
Making a total mortgage debt of $78,000

Appellants McKeen, Minshall, Hulman, Kidder and Nixon, constituting the entire board of directors, had, between Sept. 18th, 1889, and March 3d, 1890, endorsed notes of the corporation to the amount of $69,000.00. The corporation owed $126,445 of wholly unsecured debts.

On the 17th day of March, 1890, the board of directors, by Kidder, president, and Nixon, secretary, executed a mortgage to Appellant Marshall, as trustee, upon the "real estate described, with all the buildings, offices, shops, engines, and boilers, machinery, fixtures and appurtenances, to secure and indemnify Appellants, McKeen, Hulman, Minshall, Kidder and Nixon, directors, and Mayer, stockholder, against loss by reason of their endorsements. Said mortgage was not recorded as required by the statute of Indiana until May 1st, 1890.

Between December 30, 1889, and March 13, 1890, the corporation contracted indebtedness with Appellees, amounting to $11,819.38, said Appellees having no knowledge, or means of knowledge of the financial condition of said corporation,

except as represented to them by its agents. How much other indebtedness was contracted within these dates does not appear. On the 7th day of May, 1890, suit was brought by the National State Bank of Terre Haute, against said corporation, on promissory notes, unsecured, for $15,000, and the appointment of a receiver. Thereafter a receiver was appointed. On the 17th of July, 1890, this action was brought by Appellees on their own behalf and on behalf of all other creditors who might join with them, in the Circuit Court of the United States, to have said mortgage declared null and void, as a preference to the directors and against public policy.

Upon these facts and the authorities, which we have cited and quoted, we insist that the ruling and judgment of the honorable Circuit Court, that said mortgage was an attempt to secure a preference to the directors of the corporation, and was illegal and void and against public policy, was right.

And we insist that said judgement was and is fully supported by all rules of law and equity, and that there is no error in the record. And Appellees most respectfully pray that said judgment may be in all things affirmed.

CYRUS F. McNUTT,
SYDNEY B. DAVIS,
Solicitors.

J. G. and F. A. McNUTT,
S. M. REYNOLDS, and
GEO. M. DAVIS,
Of Counsel.